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No. (1)

In The
Supreme Court of the United States

GEORGE RUDY CUNDIFF AND
CHRISTOPHER SETH CUNDIFF,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LESLIE E. NUNN
Counsel of Record
P. O. BOX 99
CYNTHIANA, IN 47612
(812) 431-3638

Counsel for Petitioners

May 5, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT AND THE SIXTH CIRCUIT COURT OF APPEALS HAVE APPLIED THE INCORRECT TEST TO DETERMINE WHETHER THE CLEAN WATER ACT APPLIES IN THIS INSTANT CASE.

II. WHETHER, EVEN IF THE SUPREME COURT HOLDS THAT THE CUNDIFF PROPERTY IS A WETLAND, THE CUNDIFFS' WERE NOT REQUIRED TO HAVE A PERMIT ISSUED BY THE U.S. CORPS OF ENGINEERS.

III. WHETHER THE CONDUCT OF THE UNITED STATES CONSTITUES A WRONGFUL TAKING OF THE PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption of the case. Petitioners are private individuals and have no parent corporation and no publicly held corporation has a 10% or greater ownership interest in the Petitioners.

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OPINIONS BELOW

The United States District Court for the Western District of Kentucky (Owensboro Division) entered its judgment holding that the Clean Water Act applied to the Petitioners, that the Petitioners were required to have a permit issued by the United States Corps of Engineers, and that there was no wrongful taking of the Petitioners' property without just compensation. This opinion is attached in Pet. App. B, 34a. 480 F.Supp.2d 940

The United States Court of Appeals for the Sixth Circuit issued its decision affirming the decision of the United States District Court in all aspects. That decision is also attached hereto in Pet. App. A , 1a.

JURISDICTION

Petitioners seek review of a final decision of the Court of Appeals entered on February 4, 2009. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Petitioners seek review of the Sixth Circuit Court of Appeals' decision affirming the District Court's decision applying the incorrect test under Rapanos v. United States, rejecting their contention that the Petitioners' "Swamp Busters" permit issued by the United States Department of Agriculture allowed them to drain an alleged wetland without having a permit from the United States Corps of Engineers, and refusing to recognize that the United States was taking the Petitioners' property without just

compensation in violation of the United States Constitution.

Factual Statement:

The Petitioners, father Rudy Cundiff and son Seth Cundiff, (hereinafter "Cundiffs" or "Petitioners") own two adjacent tracts of land in Muhlenberg County, Kentucky which border Pond and Caney Creeks. There is an abandoned underground coal mine on property owned by a person not a party to this action which is adjacent to the Petitioners' land. The entrance to this abandoned mine is at a higher elevation than the Cundiff property. An orange/red acid water is discharged from this abandoned mine twenty-four hours a day and it flows downhill and onto the Cundiff property. The acid water silted in drainage ditches which had been dug on the property years ago to permit farming operations. This caused the acid water to pond on the Cundiff property at times.

The Cundiff property had been part of a larger tract of ground known as the Martin property. Owners of the Martin property obtained from the United States Department of Agriculture a Commenced Wetland Conversion Permit (also known as a "Swamp Buster Permit") on March 28, 1989 authorizing the draining of the Cundiff property. When the Cundiffs purchased their land from the larger Martin tract, the permission to drain the Cundiff land passed to the Cundiffs. This Swamp Buster Permit specified the drainage must be completed on or before January 1, 1995.

The Cundiffs did not obtain any permit from the United States Corps of Engineers, relying on their

United States Department of Agriculture Swamp Buster Permit. Cundiffs began cleaning out the existing drainage ditches and drained the land, taking down dead trees which had been killed by the acid water. In October, 1991, the Corps of Engineers sent to the Cundiffs a cease-and-desist letter prohibiting any further activity, at a time when the Swamp Buster Permit was still valid for approximately another four years. The Cundiffs did not cease their operations and the United States sued.

The United States filed their complaint against the Petitioners alleging violations of the Clean Water Act (CWA), 33 U.S.C. Sections 1311, 1319, 1342, 1362 et seq. At a subsequent trial, the United States District Court for the Western District of Kentucky, the Honorable Joseph H. McKinley, Jr. presiding, found against the Petitioners, and imposed a civil penalty of $225,000 against them, suspending all but $25,000 (480 F.Supp.2d 940). The Petitioners appealed that judgment to the United States Court of Appeals for the Sixth Circuit.

The matter was then referred back to the United States District Court by the Sixth Circuit Court of Appeals due to the then recent ruling of the United States Supreme Court in the case of Rapanos v. United States regarding jurisdiction over waters of the United States. The Trial Court held a hearing on this issue, ruled in favor of the United States and against the Petitioners, and the Petitioners appealed that decision as well. 480 F.Supp.2d 940. See also 28 U.S.C. Section 1291. The Sixth Circuit affirmed the decision of the United States District Court in its entirety. It is from that decision that the Petitioners file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case is important and warrants review. There is a conflict among the Courts of Appeal as to the application of Rapanos v. United States, 547 U.S. 715. This case involves the application of the Clean Water Act, the legal effect of regulatory taking of private land by restrictinig its use by it owners, and the effect of conflicting federal departments and agencies issuing permits to drain wetlands.

ARGUMENT

I. THE TRIAL COURT AND THE SIXTH CIRUCIT COURT OF APPEALS HAVE APPLIED THE INCORRECT TEST TO DETERMINE WHETHER THE CLEAN WATER ACT APPLIES IN THIS INSTANT CASE.

Is There a Controlling Opinion in Rapanos v. United States?

This is a case involving the Clean Water Act. In the case of Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159, the United States Supreme Court addressed the issue of what are the waters of the United States in order to give the United States Government jurisdiction over wetlands. The Supreme Court split its vote 4-1-4, with four justices deciding there was no jurisdiction in Rapanos (the plurality), one justice (Justice Kennedy) concurring that there was no jurisdiction but for differing reasons, and four justices dissenting with the view that there was jurisdiction. Each vote wrote its own opinion,

giving three separate opinions as to the outcome of the case.

The plurality held that waters of the United States include only "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, (and) lakes" 126 S.Ct. at 2225. Justice Scalia, writing for the plurality, continued that "only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between 'waters' and wetlands, are adjacent to such waters and covered" by the Clean Water Act.

Justice Kennedy, concurring in the judgment, but for different rationale, wrote that there would be jurisdiction if the wetlands "possess a significant nexus to waters that are or were navigable-in-fact or that could reasonably be so made." Id at 2236. Although Justice Kennedy did not define the "nexus," he did state that this nexus would be there if "either alone or in combination with similarly situated lands in the region, (they) significantly affect the chemical, physical, and biological integrity of the other covered waters more readily understood as navigable." Id. at 2248.

Justice Stevens, writing for the dissent, stated that the significant nexus requirement is "categorically satisfied as to wetlands adjacent to navigable waters or their tributaries," and said that the dissenting justices would all find jurisdiction present in situations where either the tests of the plurality or Justice Kennedy found jurisdiction.

Confusion has followed Rapanos within the Circuit Courts of Appeal. In the United States v. Chevron Pipe Line Co., 437 F.Supp.2d 605 (N.D.Tex 2006), the court noted that there was a lack of a clear legal standard in Rapanos. It also stated that Justice Kennedy advanced an ambiguous test – whether a 'significant nexus' exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" Id. 613.

That there is confusion on the state of law as to what are "waters of the United States" is perhaps most clearly outlined by Judge Robert B. Propst in the Northern District of Alabama on November 7, 2007 when he decided in United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), "I write this opinion to explain why I will direct the Clerk to reassign this case to another judge for trial. At least one of the reasons is that I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again."

Judge Propst continued "I will try to pique the interest of the readers of this opinion by stating that the answer to that question has been determined to be what one Justice of the Supreme Court of the United States has written which was not agreed to by any of the other eight Supreme Court Justices in Rapanos v. U.S., 126 S.Ct. 2208 (2005). Remarkably, this conclusion was reached because the Eleventh Circuit held that a test which serves to broaden federal jurisdiction ('i.e., less restrictive of CWA jurisdiction') is the 'less far reaching' and 'narrowest' of two purported tests. This holding appears to be directly

contrary to Supreme Court cases which were precedent for the Supreme Court in Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) case relied upon by the Eleventh Circuit." (citations added)

Judge Propst explains that "Since the Eleventh Circuit held in Robison, supra, at *12, that 'pursuant to Marks, we adopt Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under Rapanos, 'it is appropriate to see what the plurality said about Justice Kennedy's opinion." He then goes on to outline 12 criticisms raised by the plurality against Justice Kennedy's opinion. The plurality then, Judge Propst finds, lists eight criticisms against the dissent. Justice Kennedy mentions eight criticisms of the plurality, and the dissent lists 14 criticisms of the plurality and Justice Kennedy.

Judge Propst then lists nine concerns of his own about the Rapanos decision, including, but not limited to: nobody has attempted in any opinion to distinguish the meanings of "relatively permanent" and "intermittent;" and, among seven other concerns, no justice in Rapanos (including Justice Kennedy himself) has stated that Justice Kennedy's opinion would be controlling.

The Plurality Opinion Controls

Marks v. United States, supra, held in reviewing a Sixth Circuit Court of Appeals case that "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred

in the judgments on the narrowest grounds....'" No definition of "narrowest" is given in Marks.

When we go to Webster's Dictionary, we find the definition of "narrow" to be 1. Of little breadth, not wide or broad; 2. Of little extent; very limited; 3. Having but a little margin; 4. Limited as to means. Presumably, the word "narrowest" would be defined as of the least breadth, or of the least extent, having but the least margin, most limited as to means, and the like.

But, a reading of Marks shows it's opinion relies on Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) that reads "Since five Justices wrote separately in support of the judgments, in Furman v. Georgia, 408 U.S. 238 (1972), the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."

Judge Propst further felt that the plurality controlled because Justice Kennedy's concurrence rejected two limitations imposed by the plurality's test on the definition of navigable waters, Robison, supra, at *12. "Eight justices imposed a total limitation on Justice Kennedy's test."

If Marks is controlling as to which opinion is the "law," it is difficult to see how Justice Kennedy's opinion is more restrictive than the plurality's requirement. In fact, in the dissent, Justice Stevens stated "I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the nation's waters as within the Corps' jurisdiction..." How, then, can Justice Kennedy's opinion be more narrow if it grants more jurisdiction?

The plurality holds that only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between "waters" and wetlands, are adjacent to such waters and covered by the Clean Water Act.

On the other hand, Justice Kennedy holds that any wetland that either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of the other covered waters more readily understood as navigable is covered by the Clean Water Act.

"Marks is workable - one opinion can be meaningfully regarded as 'narrower' than another – only when one opinion is a logical subset of other, broader opinions. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991). This will work only when one opinion reaches that result for less sweeping reasons than the other." United States v. Johnson, 467 F.3d 56 (1st Cir. 2006)

Justice Kennedy does not require a continuous surface connection, which is certainly restrictive. The plurality does not permit such an ephemeral definition as "affecting the chemical, physical and biological integrity of other covered waters" to control. Justice Kennedy's very general requirement is certainly much easier to meet than is the plurality's "continuous surface connection." Therefore, a strict application of Marks results in the plurality's opinion being more restrictive and therefore being the controlling opinion in Rapanos.

Incorrect Decision as to Controlling Opinion by the Trial Judge and the United States Sixth Circuit Court of Appeals

Both the trial court and the Sixth Circuit Court of Appeals held that either the plurality's standard or Justice Kennedy's standard in the Rapanos case apply. The Petitioners argue that only the plurality's standard applies. Further, even if either will apply, the Petitioners argue that the United States failed to prove that they had met either the plurality's standard or the standard of Justice Kennedy.

In speaking of the U.S. Army Corps of Engineers, United States v. Riverside Bayview, 474 U.S. at 132, (106 S.Ct. 455, 88 L.Ed.2d 419 (1985)) the Supreme Court held that

> "(T)he corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array (947) of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious."

Based on this Riverside Bayview wording, the trial judge in this instant case incorrectly reasoned that "according to the Rapanos plurality, because of this inherent ambiguity, the 'Supreme Court in Riverside Bayview held the agency could reasonably conclude

that a wetland that adjoined waters of the United States is itself a part of those waters." And, he concluded (again incorrectly) "Given this discussion of Riverside Bayview, Justice Scalia clearly did not intend that the water level of the wetland and the covered "waters" must be completely level. Such a conclusion would completely eviscerate the plurality's recognition that a gradual transition can exist from water to land, e.g. shallows, marshes, mudflats, swamps, bogs – in short." (See the Trial Court's decision at Apx B at page 47a and the Sixth Circuit's decision at Apx A at page 20a)

This is not the case, however. The transition from water to land through shallows, marshes, mudflats, swamps, bogs, etc. can and does occur at essentially the same level of elevation. Obviously if it were perfectly level, the water would not move and would therefore be stagnant. However, the slope of the change in elevation can be almost level and still form a continuous surface connection of water molecules on the earth's surface. Such a reading of Riverside Bayview does not eviscerate the plurality, but is actually quite consistent with Justice Scalia's words. A reading of Rapanos and other Justice Scalia opinions clearly shows that Justice Scalia is careful in his selection and usage of words!

The plurality in Rapanos clearly held that waters of the United States includes only "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, ... oceans, rivers and lakes." The plurality went on to further state "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their

own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." At 2226.

Definition of Continuous Surface Connection

The issue, in part, then revolves around the definition of "continuous surface connection" as used by Justice Scalia. Webster defines the word "continuous" as "marked by uninterrupted extension in space, time or sequence." Surface" is defined as "the exterior or upper boundary of an object or body, the external or superficial aspect of something, an external part or layer." "Connect" is defined as "to become joined" and "connection" is defined as "the act of connecting; the state of being connected." Connecting these words (in their "Webster" meaning) together gives the following meaning to "continuous surface connection:" the uninterrupted extension of connected molecules of water on the exterior or external part or layer of the earth. To read anything else into the meaning of the words "continuous surface connection" is to fly in the face of obvious, defined usage.

In explaining to a witness the Petitioners' view, the trial judge correctly said:

> THE COURT: "Right. Now, I think counsel is reading the Supreme Court opinion and thinking about that part of the opinion that talks about such that there is no clear demarcation between where the wetlands start and the waters end, or I may have that flipped."
>
> MR. NUNN (Petitioners' attorney): "Yes, sir."

> THE COURT: "And so he's thinking, well, I can walk up there on that property and I can see the ground that the Court has determined is a wetland, and then I can see the water of the United States, which is Pond Creek, and I can tell where the water is and then I can tell where the wetland is.
>
> MR. NUNN: "And I can see the wetland is at this elevation and the creek is down at that one. (indicating)
>
> THE COURT: "Right. So the question is, what did the Supreme Court mean when they said "continuous surface connection?" (R. 186, Trial Record 01-25-07, pp. 99, 100, Apx. 1020-21) Note: All references to pages refer to the transcript of the January 25, 2007 hearing.

Again, it is the Petitioners' position that, as stated, there must be a continuous water **surface** between the wetland and the stream so that one cannot tell where the wetland ends and the stream begins. This water can flow through shallows, marshes, mudflats, swamps, and bogs as it moves from the wetland to the stream, but there must be a continuous connection of the water molecules on the surface (all at essentially the same level of elevation). The emphasis here is on the word "surface." On the Cundiff property, the surface of the alleged wetland is normally as much as eight to ten feet higher than the surface on Pond Creek and Caney Creek.

The issue of what is meant by "continuous surface connection" was addressed in the case of Simsbury-Avon Preservation Society v. Metacon Gun Club, 472 F. Supp.2d 219 (Conn. 2007), decided on January 31,

2007, the by the district court for the District of Connecticut. That court required a continuous surface connection as argued by the Petitioners here. The evidence there, like in this instant case, showed only a continuous surface connection between the alleged wetland and a river after heavy rains and thawing of snow and ice. The court in Simsbury said "While plaintiffs have offered evidence showing that a surface water connection does at times exist, they offer no evidence demonstrating a continuous connection between the Metacon wetland and Horseshoe Cove or the Farmington River such that there exists "no clear demarcation between 'waters' and wetlands" as required by the plurality in Rapanos, 126 S.Ct. at 2226. Therefore, the defendant is entitled to summary judgment under the plurality standard."

Different surface levels between the surface of the Cundiff properties and the creeks?

During the trial, in examining the photograph marked Defendants' Exhibit H, (Apx 671) Petitioner Rudy Cundiff was asked by Petitioners' attorney,

> MR. NUNN: "Mr. Cundiff, how much difference is there from the elevation of the water to the top of the ground surface of your property there?
>
> MR. CUNDIFF: "A pretty good indicator is that's me standing there in the top left corner, and I'm close to 6 feet, and there's 4 foot above my head you have got to get to the property. So it's approximately 10 foot from where I'm standing up to my property.

MR. NUNN: "And approximately how deep would you say the water is in that photograph?"

MR. CUNDIFF: "Well, if you'll notice to the left of me it's about 3 or 4 inches deep.... That's Caney Creek with my four-wheeler sitting in the middle of it it...And, as you can see, the water is maybe a couple inches deep." (R. 186, Trial Record 01-25-07, p. 144, Apx. 1042)

Speaking of another photograph in Exhibit H (Apx 671),

MR. CUNDIFF "The bottom left-hand, that is also Caney Creek....you can also see the grass growing out there in the middle of the water, which means it's not over three or 4 inches deep." (R. 186, Trial Record 01-25-07, p. 145, Apx. 1043)

MR. CUNDIFF Speaking of Exhibit J (Apx 673) : "Top left corner, that is Pond Creek after Caney Creek and Pond Creek is run together...Pond Creek goes to the left there where my dog is standing. ... so you can see how deep it is. I mean, it's just very little bit of water there.

"There again it's 8 to 10 foot from the water up to my property." (R. 186, Trial Record 01-25-07, p. 145-46, Apx. 1043-44)

As to other photographs marked Defendants' Exhibit K, Exhibit L, Exhibit M, and Exhibit N (Apx 674, 675, 676, and 677, respectively), Petitioner Rudy Cundiff said all show water in creeks is only a couple of inches deep and it is 8 to 10 feet from the surface of

the creek water up to the surface of his land. (R. 186, Trial Record 01-25-07, pp. 146, 147, Apx. 1044-45)

The only way, then, that the surface water level of the wetland could be the same level as the surface water level of the creeks on the Cundiff property would be if the creeks were full of water from a storm event and overflowing water from the banks of the creeks onto the surface of the Cundiff property.

In speaking of water overflowing the creek banks and getting onto the surface of the Cundiff property, the United States expert, Dr. Lee, testified at the trial "Figure 10 also includes a series of arrows that indicate where ***we think*** water from the Pond Creek and Caney Creek channels overflows during storm events, goes over the banks of the existing creeks and into the wetlands of the Cundiff tracts on the north and south." (R. 186, Trial Record 1-25-07, p. 37, Apx. 975) (emphasis added). Clearly, Dr. Lee did not know for certain what the water does when it goes over the banks of the creeks because he has never seen that happen. It happens very seldom. The surface of the water in the creeks was well below the surface of the Cundiff property the only time Dr. Lee was ever at the Cundiff property.

Later, at the trial, Dr. Lee, the Government's witness continued "...And then when the height of the water –or I want to call it the stage of the water in Pond Creek goes up, increases, on a storm event, the engagement of the creek channel to its adjacent floodplain to the abutting forested wetlands and cleared areas in the south tract takes places via overbank flooding." To further demonstrate the only time surface waters would be continuously connected

would be in event of a large storm, Dr. Lee said "At the same time, ***if*** you have a storm of sufficient duration or intensity, it can increase the stage in Caney Creek channel itself and cause water to overbank flow and flow back into the forested scrub shrub and emergent wetlands that occur in the north tract." (R. 186, Trial Record 01-25-07, p. 68, Apx. 1004) (emphasis added)

The evidence was that this "overflowing" occurs only several times a year. (R. 167 Pretrial Memorandum, Declarations, Apx. 715) Clearly, even Dr. Lee's testimony indicates the Government admits this overflowing is a rare or unusual occurrence. Only when there is an "overflowing" would there be a continuous surface connection (at essentially the same elevation) between the surface of the water level on the alleged wetland and the surface of the water level on Pond Creek or Caney Creek. And it is the Petitioners' position that only on these few, rare occasions would there be a continuous surface connection between the water on the wetland and the water on Pond Creek or Caney Creek where you could not tell where the wetland ends and the water begins. Surely this is not what was intended by the plurality or Justice Kennedy in Rapanos.

The Sixth Circuit, however, held the Cundiff's argument of a continuous surface connection is too restrictive and that only "some kind of dampness..." is sufficient (at the bottom of page 14 of the Court's opinion). Also, in footnote 5 of the Sixth Circuit's opinion, it states "At oral argument, the Cundiffs' counsel conceded that seasonal rivers and like water bodies would be covered by the plurality's test." This statement of counsel was with the understanding that

the Circuit Court was referring to when a seasonal river was at "flood stage" and, at that time, there would be a continual surface connection of the water from the flooded river to any adjacent now flooded wetlands.

Applying the Justice Kennedy significant nexus test

The Trial Court then found that the United States had met the standard set forth by Justice Kennedy. The Petitioners appealed that this is not so and the evidence does not support the findings of the trial court.

The Simsbury case also addresses Justice Kennedy's opinion. The court in Simsbury says "While Justice Kennedy states that the 'substantial nexus' test is 'consistent with SWANCC (Solid Waste Agency of N Cook County v. U.S. Army Corps of Engineers (531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001)) and Riverside Bayview,' the actual phrase 'substantial nexus' does not appear in those opinions." (citations added) The court concludes that "Thus, Justice Kennedy's test is fact-based, rather than categorical...."

To find that the Justice Kennedy significant nexus test is met, the Government must prove the Cundiff alleged wetlands "significantly affect the chemical, physical, and biological integrity of the other covered waters more readily understood as navigable." Since Justice Kennedy used the words "chemical, physical ***and*** biological" (emphasis added), then all three must be proved by the Government to meet the significant nexus test.

In reviewing the evidence admitted against the alleged polluter Metacon Gun Club, the Simsbury court noted that while there was some prior testing of water samples, they were in effect inconclusive. And, there was no testing of soil samples. Therefore, the Simsbury court held the evidence against the alleged polluter was insufficient, and that the Clean Water Act could not apply under the Justice Kennedy significant nexus test as there were no jurisdictional waters.

In the Cundiff case at hand, there also was no evidence of the results of any soil sampling tests or water sampling tests. In fact, the evidence of the Government suggests the United States believes that testing of the soil would be useless. One of the most surprising things about Dr. Lee's testimony is that when asked, in essence, if vegetation is an indicator of wetlands, Dr. Lee testified "**Soil is not a wetland**, and I don't use vegetation to figure out if soil is a wetland, sir." (R. 186, Trial Record 01-25-07, p. 91, 92, Apx. 1017-18) (emphasis added) This certainly flies in the face of the Corps of Engineer's three requirements for determination of the existence of wetlands: soil, vegetation, and hydrology.

In the instant Cundiff case, there was no evidence of any testing of water or other samples. The Government's expert Ed Carroll testified that no samples were taken.

> MR. NUNN: "So as far as any laboratory chemical analysis of the water relating to Mr. Cundiff to show – there's no analysis that you know of to prove that he is adversely affecting it or he's not affecting it or he is benefiting it? There's no chemical analysis or laboratory analysis to show

that; is that correct?" (R. 186, Trial Record 01-25-07,pp. 137, 138, Apx. 1039-40)

MR. ED CARROLL: "Not direct analysis in regard to that point." (R. 186, Trial Record 01-25-07 p. 138, Apx. 1040) This lack of laboratory analysis proved fatal to the existence of jurisdictional waters in the Simsbury case. The judge there said "Plaintiff's inconclusive water sampling data cannot buttress the rest of plaintiffs' record so as to demonstrate that a rational trier of fact could find the required substantial nexus and thus find for the plaintiffs on the record taken as a whole."

Further, in the Cundiff case at hand, there was no evidence of any testing or sampling done for aquatic or other biological life, so the Government's evidence is lacking here as well. In summation, the Government's evidence also fails to meet the Justice Kennedy significant nexus test.

The Sixth Circuit held that there was no requirement anywhere that any laboratory analysis is the sole method by which a significant nexus may be proved, completely disregarding Simsbury.

II. EVEN IF THE SUPREME COURT HOLDS THAT THE CUNDIFF PROERTY IS A WETLAND, THE CUNDIFFS' WERE NOT REQUIRED TO HAVE A PERMIT ISSUED BY THE U.S. CORPS OF ENGINEERS.

The Commence Wetland Conversion permit granted by the US Department of Agriculture, known as the "Swamp Buster's Permit" (which the Cundiffs had), authorized the Cundiffs' work on their lands.

The draining of a wetland does not, per se, require a permit under the Clean Water Act. Save Our Cmty. v. United States E.P.A., 971 F.2d 1155 (5th Cir. 1992).

We are dealing with a situation where the United States in one agency (U.S. Department of Agriculture) says one thing and the United States in another agency (EPA) says another thing.

At the same time the Environmental Protection Agency was trying to prevent any "damage" to wetlands, the United States Department of Agriculture authorized the draining of swamps pursuant to 7 C.F.R. Section 12.2 (a):

> (2) Commenced-conversion wetland is a wetland, farmed wetland, farmed-wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985
>
> (3) Converted wetland is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for

> the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulation described herein: ...

Clearly, the Cundiff property met these requirements. Defendant's Exhibit DXGG (Apx 1062) is entitled "Data Needed for Swamp Buster Commenced and Third-Party Determinations" and provides that the activity was started in 1981. Defendant's Exhibit DXHH (Apx 1063) is the letter dated March 28, 1989 approving the draining of the Cundiff property and, in the last paragraph thereof, specifying that the work must be completed on or before January 1, 1995. This permit was issued to Mr. Wayne Johnson of the Martin Properties, from whom Rudy Cundiff purchased the subject property.

The testimony was extensive as to the water standing on the Cundiff property some of the time. Petitioners' witness, Wayne Johnson, from whom Petitioners purchased the property, testified that he received a "Swamp Buster" permit, issued by the United States Department of Agriculture (Defendant Exhibit DX-HH – admitted into evidence (R.125, TR Vol 3, Page 54, Apx 937) which is technically referred to as a Commence Wetland Conversion permit, and that he received the permit to what became the Cundiff property. In fact, he stated "I couldn't understand why they (the EPA) got him (Rudy Cundiff) for swamp busting or whatever it was when there was already a commence wetland conversion on it." (R.125, TR Vol 3, Page 28, Apx 922).

This permit was issued for the Martin Properties, a predecessor in title to Cundiffs' property (R.125, TR

Vol 3, Page 22, Apx 920) and, as Petitioner Rudy Cundiff testified regarding this permit "according to that last paragraph down there, it says 'Conversion activity considered commence before December 23rd, 1985, and shall lose its exempt statues if not completed on before January the 1st, 1995.' So I thought I had approximately four or five years to clean out the ditches." (R.125, TR Vol 3, Page 52, Apx 936).

The Commence Wetland Conversion (Swamp Buster) Permit reads, in part, "The area adjacent to existing fields have been cleared and drained since 1981. Drainage mains have been established to point in Caney Creek since they were improved in about 1978." (R.135, Vol SJ, Page 5, Apx 781) Although this permit gave the Petitioners until January 1, 1995 to complete the work, the EPA issued its cease and desist order to Rudy in 1991, thereby preventing him from completing the drainage work by the 1995 deadline. (R.135, Vol SJ, Pages 5 and 6, Apx 781, 782) Petitioner Rudy Cundiff testified that the permit was for his property, the part which he purchased of the Martin thousand acres." (R.135, Vol SJ, Pages 33 and 34, Apx 787, 788)

The Sixth Circuit completely ignored this issue, discussing instead that the Cundiffs were not entitled to either a "farming" exception or a ditch maintenance exception. The statues and regulations referred to dealt with the Environmental Protection Agency and U.S. Army Corps of Engineers, and no reference was made to the United States Department of Agriculture's Swamp Buster's Permit.

III. THE CONDUCT OF THE UNITED STATES CONSTITUES A WRONGFUL TAKING OF THE DEFENDANTS' PROPERTY WITHOUT JUST COMPENSATION

Time before financial return on restored land

It is well settled that the Constitution does not forbid Government to take private property for public use; it merely requires that, if it does so, it pay the owner just compensation. The Constitution is not violated until the Government refuses to compensate the owner. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95, 105 S.Ct. 3108, 87 L.Ed. 2d 126 and n. 13 (1985).

A categorical regulatory taking occurs when the Government's regulation of land denies a property owner of "all economically beneficial or productive use of the land." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992). And, even if a property owner retains some economic benefit in his land, he may still be entitled to compensation for a partial regulatory taking. Palazzo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001); Eastern Enters. v. Apfel, 524 U.S. 498, 522, 118 S.Ct. 1231, 141 L.Ed. 2d 451 (1998). In determining whether a partial regulatory taking has occurred, courts should consider (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-back expectations; and (3) the character of Governmental action. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The purpose of the Takings Clause is to prevent the Government from 'forcing some people

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

Here, the Government has taken the Petitioners' land, forced them to maintain their own land to the Government's specifications as a wetland, refused to let the Petitioners use it for livestock grazing or any other useful purpose, ordered what trees the Petitioners must plant, and specified species of trees that will not produce any income for from 60 to 80 years. To place the Petitioners in a position where they are forced to allow the United States Government to use their land under only the orders of the United States Government, in such a way that the Petitioners will never realize any income therefrom during their life time, is a taking for certain.

Mr. Ricky L. Harrell, Forester with the Kentucky Division of Forestry, testified (regarding the species of trees the United States has forced the Petitioners to plant on their land which is the subject of this lawsuit) in answer to the Petitioners' attorney Mr. Nunn's questions as follows:

> MR. NUNN: Q "Once the trees are established, however long that becomes, about how long does it take for them to begin reproducing themselves with seeds or acorns or whatever it may be depending on the species?"
>
> MR. HARRELL: A "You talk bottomland hardwoods before they can get tall enough to actually produce seeds theirselves (sic), you're talking 30 years or so."

MR. NUNN: Q "And to become marketable where you could do something with them, how long would that be?

MR. HARRELL: A "Oh, yes. Bottomland hardwoods in Kentucky, you're generally talking somewhere 60 to 80 years. ... Sixty to 80 years for a mature saw timber." (R. 186, Trial Record 01-25-07, p. 175, Apx. 1048)

So, it will be many years before the trees that the United States wants planted can ever hope to provide any income for the Petitioners. In fact, the United States attorney admitted as much when he said "One other point about the trees. The planting of trees on the southern tract has the added benefit of creating a potential income stream for Mr. Cundiff. I know in years in the future..." (R.125, TR Vol 3, Page 151, Apx 966)

Another United States attorney in the case, Mr. Rave admitted in Court that the Government wants "it to be returned to timber and he could harvest the timber and use that for income. Of course, we're talking many years before that would occur." (R.135, Vol SJ, Page 52, Apx 798)

The Petitioners do not desire to construct anything on their property to make fabulous sums of money. Even the United States attorney admitted in his closing argument that "The second factor relates to economic benefit, if any, and I don't believe there was any relevant evidence on that during the case and certainly shouldn't weigh heavily in the Court's analysis, from our point of view." (R.125, TR Vol 3, Page 151, Apx 966)

The Restrictions Placed on the Petitioners are such as to Constitute a Taking Without Just Compensation:

A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise by available to the property owner, but leaves the owner with substantial viable economic use." Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1357 (Fed. Cir.) which modified 208 F.3d 1374 (Fed. Cir. 2000).

In Florida Rock Indus, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), the Court stated "the owner's opportunity to recoup its investment or better ... cannot be ignored" at p. 905. Further, when a regulation prevents all economically productive or beneficial uses of land, compensation must be paid to sustain the regulatory action. Lucas v. South Carolina Costal Council, supra.

In Loretto v. Teleprompter Manhattan VATV Corp, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982), the Supreme Court held that the Government owes compensation to a property owner regardless of the public interest served by taking the property. A regulatory taking occurs when some significant restriction is placed upon an owner's use of his property for which "justice and fairness" require that compensation be given. Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

While property may be regulated to a certain extent, if that regulation goes too far it will be recognized as a taking. Penn Coal Co. v. Mahon, 260

U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Once a police power regulation effects a taking, the Government entity must pay just compensation for that taking. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987). Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) The purpose of this constitutional guarantee is to keep the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Penn Central, supra, Armstrong v. United States, supra.

The Cundiffs wanted to use the land for growing crops (as it had been before), raising livestock, or nut trees from which a paying crop could be taken or marketable timber with a short growing season, but the United States has been prevented from doing this. (R.125, TR Vol 1, Pages 36, 155, 156, 157, Apx 807, 840, 841, 842; TR Vol 3, Pages 60, 81, 83, 98, 112, Apx 939, 946, 948, 955, 958) The restoration plan and order of the Trial Court is that the Cundiffs can do nothing on their lands, except to plant trees of varieties that the United States directs, which might bring financial reward to Cundiff heirs in many, hardly to be considered economically valuable use.

The wrongful action by the United States in allowing the acid mine water to take over the Cundiff property and preclude its use for anything other than a filter bed for this acid mine water was a taking under the provisions of the Fifth Amendment of the United States Constitution and the Cundiffs have not been compensated for it. Palazzo v. Rhode Island, supra, Penn Coal Co. v. Mahon, supra, United States

v. North Am. Transp. 253 U.S. 330, 333, 40 S.Ct. 518, 64 L.Ed. 935 (1920), First English Evangelical Lutheran Church v. County of Los Angeles, supra; Palm Beach Isles Associates v. United States, supra.

In Palm Beach Isles Associates v. United States, the Court of Appeals for the Federal Circuit said "when Government, though purporting to regulate the uses of a property, in fact imposes restrictions that have the same effect as a physical seizure and occupation for public purposes – leaving the owner with essentially no viable economic uses whatever and no rights except bare legal title" the Government must pay the owner. That court stated that "when no productive or economically beneficial use of land is permitted ... both law and sound constitutional policy entitle the owner to just compensation without regard to the nature of the owner's initial investment-backed expectations."

The Supreme Court held in Palazzo that "Where a regulation places limitations on land that falls short of eliminating all economically beneficial use, a taking nonetheless may have occurred .... These inquiries are informed by the purpose of the Takings Clause, which is to prevent the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 121 S..Ct. at 2457. Lucas v. South Carolina Costal Council, supra; Goldblatt v. Hempstead, supra.

Takings can occur in a variety of fashions. United States v. Kansas City Life Ins. Co. 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950), Cotton Land Co. v. United States, 75 F.Supp 232 (Ct. Cl. 1948); Gordon v. City of Warren, (CA 6) 579 F.2d 386; Chicago,

Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed 979 (1897), Armstrong v. United States, supra, at 49:

The Supreme Court said "the Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding causes of action when they are born, whether they proliferate, and when they die." United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947).

The Trial Court ruled that the responsibility for controlling the acid mine water coming onto the Petitioners' property is the Commonwealth of Kentucky. (R.61, Memorandum, Opinion and Order, Apx 595-610) However, the Commonwealth of Kentucky indicates that they have no funds available to stop the problem from occurring. Therefore, the Commonwealth of Kentucky and the United States EPA are bedfellows in this against the Cundiffs. Why doesn't the EPA go against KY and stop the problem, instead of going after the Defendants Cundiff to force them to be a band aid and take all the beneficial use of his property without paying him any compensation? Kentucky supposedly has no money, but they think the Petitioners do, so they are going to force the Cundiffs to use their resources to do what both Kentucky and the United States refuse to do. (R.125, TR Vol 3, Page 173, 174, Apx 969, 970) This is indeed a taking without any compensation!

There Are Other Ways Available to Control the Acid Mine Water Without Taking the Cundiffs' Property:

The Cundiffs offered to create "wetland cells" on part of their land that could be used where the acid mine water would be run into settlement ponds with limestone and cattails to neutralize the acid, which Ed Carroll, the United States' expert, testified would work. (R.125, TR Vol 1, Page 124, Apx 826) This was not accepted by the Government.

The Cundiffs offered to purchase other land that could be returned to wetlands and exchange that land with the United States for his unhampered use of the land that is the subject of this lawsuit. Mr. Mike Wiley, the EPA expert, however required two acres from the Cundiffs for every one of their own acres they would get to keep and use as the Cundiffs wanted. (R.125, TR Vol 1, Pages 183, 184, Apx 847, 848)

The Cundiffs asked that they be permitted to use their land for grazing cattle, but the EPA's Mr. Wiley stated that since the Cundiffs' had violated the Clean Water Act, the Government would not consider that, saying it was comparing "apples to oranges." "Now we're in the enforcement context where we try to come up with an equitable settlement that we feel like the United States and your client would accept, and we feel like it would be fair to the judge. So it's two different – that's why the apples and oranges." (R. 125, TR Vol 1, Page 186, 187, Apx 849, 850)

The Cundiffs offered to use their land "as a flood basin, and in the summertime I could use it to graze, you know, cattle, to raise hay, just use it something for myself instead of just having it taken away from me."

(R.125, TR Vol 3, Pages 63 and 64, Apx 940, 941). But the Court would not consider this.

Petitioner Rudy Cundiff testified "I asked him, I said 'Well, can we plant trees on it that will be worth something instead of willow trees and cypress trees?'" This reasonable request was also denied by the EPA and the Trial Court. (R.135, Vol SJ, Pages 54 and 55, Apx 800, 801)

The Petitioners offered other restoration proposals, all of which were denied. (R.125, TR Vol 1, Page 122, Apx 825) See R.125, TR Vol 1, Page 38, Apx 808. See also Def Exhibit DX –II, (R.125, TR Vol 3, Page 58, Apx 938) prepared by Petitioners' consultant SMR, but rejected by the Government (R.125, TR Vol 3, Page 110, 119, Apx 957, 959; See also Pl Exhibit 14, Apx 1056-58)

Another of Petitioners' plan (DDI) was rejected by the Government (R.125, TR Vol 3, Page 64, Apx 941). Still another Petitioner expert Third Rock Consultants' proposal to put in a limestone filtering basin to filter out the acid mine water was rejected by the Government. (R.125, TR Vol 3, Page 64, Apx 941)

The Petitioners offered to give a portion of their land to the EPA to use for a filter basin and use some of their land for grazing cattle. (R.125, TR Vol 3, Page 83, Apx 948), but it was not accepted by the Trial Court. Even an attempt to try the Petitioners' proposed grazing plan for a couple years to see if it would work (R.125, TR Vol 3, Page 170, Apx 968) was denied by the Court. See also (R.125, TR Vol 3, Page 170, Apx 968). This too was denied. The Petitioner testified "Sir, I was just trying to come up with

something, like I told you, that could benefit us all." (R.125, TR Vol 3, Page 112, Apx 958) Nothing was acceptable to the Trial Court.

All of his attempts to work out a compromise had fallen on deaf ears. Petitioner Rudy Cundiff finally testified "I mean, it's my property. I still owe money on it. I just want to benefit in some way from it. If it's not, if I can't do that, then it's not my property. They (the United States) need to own it, not me." (R.125, TR Vol 3, Page 81, Apx 946)

Without compensation, the Cundiff property is now being used by the United States to "convert the acid mine drainage to a much better state" as Ed Carroll, the Kentucky wetlands biologist testified (R.125, TR Vol 1, Pages 88, 115, 119, 122, Apx 814, 821, 823, 825) Mr. Carroll admitted that the owners of properties affected by the acid mine water were being made to filter the water because the Government would not stop the discharge (R.125, TR Vol 1, Pages 128, 129, Apx 827, 828), a costly problem for Rudy. (R.125, TR Vol 1, Page 101, Apx 817)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LESLIE E. NUNN
Counsel of Record
P. O. Box 99
Cynthiana, IN 47612
(812) 431-3638

Counsel for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-5469/5905; 07-5630

[Filed February 4, 2009]

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)
v.	)
GEORGE RUDY CUNDIFF; CHRISTOPHER SETH CUNDIFF, *Defendants-Appellants.*	)

OPINION

Appeal from the United States District Court for the Western District of Kentucky at Owensboro.
No. 01-00006—Joseph H. McKinley, Jr., District Judge.

Argued: December 9, 2008

Decided and Filed: February 4, 2009

Before: MARTIN and McKEAGUE, Circuit Judges; COLLIER, Chief District Judge.*

COUNSEL

ARGUED: Leslie E. Nunn, LESLIE E. NUNN, P.C., Cynthiana, Indiana, for Appellants. Jennifer Scheller Neumann, David Fishback, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Leslie E. Nunn, LESLIE E. NUNN, P.C., Cynthiana, Indiana, for Appellants. Jennifer Scheller Neumann, David Fishback, Ellen J. Durkee, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. James Graham Murphy, NATIONAL WILDLIFE FEDERATION, Montpelier, Vermont, for Amicus Curiae.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. After eight years of failed negotiations and ignored orders, the United States sued George Rudy Cundiff (who goes by Rudy) and his son, Christopher Seth Cundiff (who goes by Seth), seeking injunctive relief and civil penalties against them for discharging "pollutants" into "waters of the United States" without a permit in violation of the Clean Water Act. 33 U.S.C. § 1362. The district court granted summary judgment for the government, imposed injunctive relief in the form of a restoration plan for the Cundiffs' wetlands, and imposed a civil

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* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

penalty of $225,000. All but $25,000 of that penalty was suspended, however, provided that the Cundiffs implemented the restoration plan. The district court also dismissed the Cundiffs' array of statutory, common law, and constitutional counterclaims. While the original appeal in this case was pending, the Supreme Court issued its splintered ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), which defined the Act's jurisdiction over "waters of the United States." In light of *Rapanos*, we returned the case to the district court to reconsider whether jurisdiction was proper over the Cundiffs' wetlands. The district court determined that it was because the Cundiffs' wetlands were in fact waters of the United States, and the Cundiffs appealed. We affirm the district court on all grounds.

I.

Defendants Rudy and Seth Cundiff own two adjacent tracts of land in Muhlenberg County, Kentucky. Their properties together sit next to Pond and Caney Creeks, which are tributaries of the Green Ri er. The Green River, in turn, flows into the Ohio er. In 1990, Rudy Cundiff bought the southern ct, which contains roughly eighty-five acres of tlands and an upland area where his house sits. When Rudy bought it, portions of the wetlands contained exceptionally acidic orangish to reddish colored water that had drained out of an abandoned coal mine located on a neighbor's nearby property. As a result, locals referred to the Cundiffs' property as a putrid eyesore, and this stagnant, discolored water caused the wetlands to become a festering mosquito haven—though the Cundiffs knew all this when they

bought it.[1] Shortly after his purchase, Cundiff began excavating drainage ditches and clearing trees to make the wetlands suitable for farming.

In October 1991, federal officials from the Army Corps of Engineers and state officials from the Kentucky Division of Water observed ditches, artificially filled wetlands, and mechanically cleared land on the wetlands. The Corps suspected possible Clean Water Act violations. Rudy had failed to obtain a section 404 permit as required for such dredging and filling activities, and further inspection revealed that Cundiff had excavated ditches in the wetlands and placed dredged material into them as filler (known as "sidecasting"). Consequently, the Corps sent him a cease-and-desist letter "specifically prohibiting any further activity involving the placement of excavated or fill material into these jurisdictional wetlands" without a federal permit.

Federal and state officials then began meeting with Cundiff in 1992, though they reached no agreement.

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[1] Singer-songwriter John Prine has colorfully recounted Muhlenberg County's sordid ecological history:

> And daddy won't you take me back to Muhlenberg County / Down by the Green River where Paradise lay / Well, I'm sorry my son, but you're too late in asking / Mister Peabody's coal train has hauled it away . . . . / Then the coal company came with the world's largest shovel / And they tortured the timber and stripped all the land / Well, they dug for their coal 'til the land was forsaken / Then they wrote it all down as the progress of man . . . .

JOHN PRINE, *Paradise, on* JOHN PRINE (Atlantic Records 1971).

Instead, he insisted on converting the wetlands into farmland and continued to drain and clear the property. The Corps referred the matter to the Environmental Protection Agency. Over the next several years, Cundiff continued his draining and ditch digging activities, simply ignoring whatever government directives came his way. In 1997 he planted wheat on the southern tract, and government officials observed downed trees in that area. The EPA issued an Order of Compliance informing him that he had violated the Clean Water Act by depositing fill material into waters of the United States without authorization, and it directed him to "immediately cease participating in or causing any additional discharges" of pollutants.

In 1998 Rudy's son, Seth, purchased a tract of land located north of Rudy's which contains roughly 103 acres of wetlands. (Seth leases this property back to Rudy for the exact amount of the mortgage payment.) Rudy quickly began excavating and clearing that property as well, activity of which Seth was aware. In October 1998, officials from the EPA informed Rudy Cundiff that he needed a permit for this work too. Rudy—somewhat surprisingly—said that, though he knew he needed a permit, he thought the Corps would never grant him one so he planned on digging his ditches anyway. He eventually completed a two-hundred foot ditch through the wetlands that extended all the way to Caney Creek, and the dredged material was "sidecast" into the wetlands to dry them out to make them arable. In 1999, Kentucky officials told Cundiff that he was destroying wetlands without a permit in violation of state law (he ignored this too), and the EPA issued additional Orders of Compliance to both Rudy and Seth Cundiff requiring them to cease

their excavation activities and to restore the unauthorized ditches by refilling them. The Cundiffs responded to these orders as they had to the others.

The United States finally sued both Rudy and Seth Cundiff, alleging that they violated Section 301(a) of the Clean Water Act for discharging pollutants into waters of the United States without a permit. 33 U.S.C. § 1311(a). The district court granted the United States's motion for summary judgment, thus finding the Cundiffs liable, and, after a bench trial, permanently enjoined them from discharging dredged or fill material or any other pollutants into waters of the United States (which it concluded that the Cundiffs' wetlands were) and imposed a civil penalty of $225,000 but suspended $200,000 of that pending the Cundiffs' adequate implementation of the restoration plan. The defendants appealed, and while that appeal was pending, the Supreme Court decided *Rapanos v. United States*, 547 U.S. 715 (2006), which addressed the scope of the term "waters of the United States" in the Clean Water Act. The parties jointly moved for a limited remand from this Court so the district court could reconsider whether jurisdiction over the wetlands was proper, and this Court remanded the case on that question. The district court concluded that the Cundiffs' wetlands were "waters of the United States," and the Cundiffs now appeal the district court's: (1) grant of summary judgment in the government's favor; (2) imposition of a civil penalty and injunctive relief; and (3) the dismissal of their counterclaims.

II.

We review the district court's legal conclusions de novo, *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005), and its factual findings for clear error. *Id.* The imposition of a monetary penalty and injunctive relief is reviewed for abuse of discretion. *United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1205 (6th Cir. 1995); *United States v. Norris*, 937 F.3d 286, 288 (6th Cir. 1991). We review the dismissal of the Cundiffs' counterclaims de novo. *Blakely v. United States*, 276 F.3d 853, 863 (6th Cir. 2002).

III.

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act prohibits "the discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. § 1311(a). "[D]ischarge of any pollutant" is broadly defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). In turn, "pollutant" is defined to include not only traditional contaminants, but also solids such as "dredged spoil, . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Act also sets up two permit schemes. Section 404(a) authorizes the Secretary of the Army (through the United States Army Corps of Engineers), or a state with an approved program, to issue permits "for the

discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 402 authorizes the Environmental Protection Agency (or a state with an approved program) to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. 33 U.S.C. § 1342. The Corps and the EPA share responsibility for implementing and enforcing Section 404. *See, e.g.*, 33 U.S.C. § 1344(b)–(c).

Although at one time the term "navigable waters" included only waters that were navigable in fact, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871), "navigable waters" is a defined term in the Act that expressly includes all "waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has repeatedly recognized that, with this definition, Congress "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). As a result, the Corps and EPA have put out substantively equivalent regulatory definitions of "waters of the United States," *compare* 33 C.F.R. § 328.3(a), *with* 40 C.F.R. § 230.3(s), that define it to encompass not only traditional navigable waters of the kind susceptible to use in interstate commerce, but also tributaries of traditional navigable waters and wetlands adjacent to covered waters. *See* 33 C.F.R. § 328.3(a)(1), 328(3)(a)(5), 328(a)(7).

A. Are the Wetlands "Waters of the United States"?

1. *Rapanos*

Rapanos involved two consolidated cases in which the Act had been applied to actual or proposed discharges of pollutants into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. 547 U.S. at 729-30. Although there was no single majority opinion, all the Justices agreed that the statutory phrase "waters of the United States" encompasses some waters not navigable in the traditional sense. *See id.* At 731 (Scalia, J., plurality opinion); *id.* at 767-68 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting). The four-Justice plurality interpreted the Act to cover "relatively permanent, standing, or continuously flowing bodies of water," 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies. *Id.* at 732 n.5 (observing that the Act's reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months").

Justice Kennedy, writing only for himself, interpreted the term to cover wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting

Solid Waste Agency v. United States Army Corps. of Eng'rs., 531 U.S. 159, 167 (2001)). He explained:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 780. And Justice Kennedy, relying on *Riverside Bayview*, concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be met "by showing adjacency alone." *Id.* On the other hand, where the wetlands are adjacent to nonnavigable tributaries, "[a]bsent more specific regulations," Justice Kennedy would require the government to "establish a significant nexus on a case-by-case basis." *Id.* He therefore concurred in the judgment vacating the lower court's decision and voted to remand the case for more fact-finding on whether the government could prove the existence of a significant nexus between the wetlands and nearby navigable-in-fact waters.

The dissenters, with Justice Stevens writing, would have upheld the determination that the wetlands at issue were "waters of the United States" as a reasonable agency interpretation of the Act under *Chevron U.S.A. Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 842-45 (1984). In the dissenters' view, any "significant nexus" requirement—insofar as the Act contained one—would be "categorically satisfied as to wetlands adjacent to navigable waters or their tributaries." *Rapanos*, 547 U.S. at 807-08.

Parsing any one of *Rapanos*'s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance. As the Chief Justice observed: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* at 758 (Roberts, C.J., concurring) (citing *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), and *Marks v. United States*, 430 U.S. 188 (1977)). The dissent, for its part, offered its view of what lower courts should do:

> In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either of those tests is met.*

Rapanos, 547 U.S. at 810 (emphasis added). Fortunately, as the following section explains,

jurisdiction is proper here under each of the primary *Rapanos* opinions and therefore we do not have to decide here, once and for all, which test controls in all future cases.

2. *Marks*-meets-*Rapanos*

In *Marks v. United States*, the Supreme Court instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (quoting *Gregg v. Georgia,* 428 U. S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But all is not always so rosy. The Supreme Court has oft-noted *Marks*' limitations, stating that it is "more easily stated than applied to the various opinions supporting the result," *Grutter*, 539 U.S. at 325 (2003), and that "[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it," *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quotations omitted).

In its short life, *Rapanos* has indeed satisfied any "bafflement" requirement. The first court to decide what opinion was controlling decided to ignore all of them and instead opted for earlier circuit precedent which it felt was clearer and more readily applied. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). The Courts of Appeals have not fared much better. The Ninth Circuit has stated that Justice Kennedy's test applies in most instances, *Northern California River Watch v. City of*

Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007), while the Eleventh Circuit has held that the Act's coverage may be established *only* under his test. *United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007). By contrast, the First and the Seventh Circuits, though differing somewhat in their analyses, have followed Justice Stevens' advice and held that the Act confers jurisdiction whenever *either* Justice Kennedy's or the plurality's test is met. *United States v. Johnson*, 467 F.3d 56, 60-66 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). This is the approach the district court here followed, largely in reliance on the First Circuit's thoughtful reasoning.

Taken literally, *Marks* instructs lower courts to choose the "narrowest" concurring opinion and to ignore dissents. *Marks*, 430 U.S. at 193. But what does "narrowest" mean? *Marks* considered an earlier Supreme Court obscenity decision, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), where the Court split on whether a particular work was protected by the First Amendment. In *Marks*, the Court determined that the *Memoirs* plurality's standard controlled because, while two Justices would have held that the First Amendment applies equally to all materials—whether obscene, hardcore, or G-rated, *id.* at 433 (Douglas, J., concurring); *id.* at 421 (Black, J., concurring)—the plurality would have afforded protection only to non-obscene materials, *id.* at 419-20, and therefore that concurring opinion was doctrinally the "narrowest."

The so-called *Marks* rule in fact derived from the Court's earlier opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg* had interpreted *Furman v. Georgia*, 408 U.S. 238 (1972), in which a majority found that Georgia's death penalty scheme was unconstitutional. Two Justices believed that the death penalty was per se unconstitutional, while three others merely stated that it was unconstitutional as then administered in Georgia. So the *Gregg* Court stated that "[s]ince five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

As these cases indicate—and contrary to assertions by the Cundiffs and their *amici*—*Marks* does not imply that the "narrowest" *Rapanos* opinion is whichever one restricts jurisdiction the most. But it also makes little sense for the "narrowest" opinion to be the one that restricts jurisdiction the least, as the government's *amici* allege; the ability to glean what substantive value judgments are buried within concurring, plurality, and single-Justice opinions would require something like divination to be performed accurately. Instead, "narrowest" opinion refers to the one which relies on the "least" doctrinally "far-reaching-common ground" among the Justices in the majority: it is the concurring opinion that offers the least change to the law. *See Johnson v. Bd. of Regents of the Univ. Of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001); *Johnson*, 467 F.3d at 63. In both *Memoirs* and *Furman* the controlling opinion was less doctrinally sweeping. The *Memoirs* controlling opinion did not agree that obscenity laws per se violated the Constitution, and

the *Furman* controlling opinion did not agree that the death penalty was per se unconstitutional.

Yet problems await. For cases like *Furman* and *Memoirs*, *Marks*' application is straightforward. But when "one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic." *King v. Palmer*, 771 F.2d 771, 782 (D.C. Cir. 1991) (en banc). Specifically, "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Id.* at 781. Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down.

Enter *Rapanos*. Although "in most cases in which [Justice Kennedy] concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality)," in other cases Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection." *Gerke*, 464 F.3d at 725. Indeed, there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view. *See Rapanos*, 547 U.S. at 756 (Scalia, J., plurality opinion) ("[Justice Kennedy's] test simply rewrites the statute."); *id.* at

778 (Kennedy, J., concurring) ("[T]he plurality reads nonexistent requirements into the Act.").[2]

Thus, because *Rapanos* is not easily reconciled with *Marks*, the question becomes what to do. Fortunately, we need not reconcile *Rapanos* with *Marks*. Here, jurisdiction is proper under both Justice Kennedy's and the plurality's tests (and thus also the dissent's). Recently, this Court addressed an analogous situation:

> Because the Supreme Court divided 4-1-4 in [*Missouri v. Seibert*, 542 U.S. 600 (2004)], there has been some confusion about whether the plurality or concurring opinion controls. Most circuits have assumed that Justice Kennedy's concurrence operates as the controlling precedent, though others have raised doubts about whether his concurrence actually represents the narrowest grounds for decision. We do not need to resolve this issue because regardless of the applicable framework Lopez's statement must be suppressed.

United States v. Pacheco-Lopez, 531 F.3d 420, 427 n.11 (6th Cir. 2008) (citations omitted). As the next section demonstrates, jurisdiction is proper here under both Justice Kennedy's and the plurality's tests, so we leave

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[2] The Pacific Legal Foundation argues that the plurality's test is a logical subset of Justice Kennedy's test. Amicus Br. at 8. But this is unpersuasive. Not only is there a theoretical possibility that the tests do not align, *Johnson*, 467 F.3d at 64, the Eleventh Circuit may have addressed such a case. *Robison*, 505 F.3d at 1223 ("This case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test.").

ultimate resolution of the *Marks*-meets-*Rapanos* debate to a future case that turns on which test in-fact controls.[3]

3. Jurisdiction is proper under both tests

Justice Kennedy's test. Under this test, the Clean Water Act applies to wetlands that "possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 758. This nexus exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id.* at 755. By contrast, "[w]hen . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory terms 'navigable waters.'" *Id.* This standard must be met on a case-by-case basis. *Id.*

The district court found that the Cundiffs' wetlands have a significant nexus with the navigable-in-fact Green River, via Pond and Caney Creeks, which are tributaries of that river. The court credited the government's expert who testified that the wetlands perform significant ecological functions in relation to the Green River and the two creeks, including: temporary and long-term water storage, filtering of the acid runoff and sediment from the nearby mine, and

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[3] The Supreme Court recently denied *certiorari* in two cases presenting this question. *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008), *cert. denied sub nom.* as *United States v. McWane*, 77 U.S.L.W. 3324 (2008); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 116 (2008).

providing an important habitat for plants and wildlife. And the court found that the Cundiffs' alterations—unauthorized ditch digging, the mechanical clearing of land, and the dredging of material and using it as filler—have undermined the wetlands' ability to store water which, in turn, has affected the frequency and extent of flooding, and increased the flood peaks in the Green River. Thus, it has "impact[ed] navigation, crop production in bottomlands, downstream bank erosion, and sedimentation." *United States v. Cundiff*, 480 F. Supp. 2d 940, 945 (W.D. Ky. 2007) (quoting *Report of Dr. Lyndon C. Lee*, J.A. 172). The district court further credited another government expert's testimony who stated that Rudy Cundiff's ditch digging had created channels so that the acid mine runoff would largely bypass his wetlands and instead flow more directly into Pond and Caney Creek and thus the Green River. It found that these channels cause "direct and significant impacts to navigation (via sediment accumulation in the Green River) and to aquatic food webs . . . that are not adapted to thrive in acid waters and/or sediment-choked environments." *Cundiff*, 480 F. Supp. 2d at 944 (quoting *Lee Report*). The record supports this conclusion and the district court found that the government's witnesses were credible, and so we cannot say that its conclusion was clearly erroneous.[4]

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[4] For instance, if one dropped a poison into the Cundiffs' wetlands, the record indicates that it would find its way to the two creeks and the Green River, therefore indicating a significant chemical, physical, or biological connection between the wetlands and the nearby navigable-in-fact waters.

The Cundiffs do not really dispute these findings. Instead, they assert that a "significant nexus" may only be proved by "laboratory analysis" of soil samples, water samples, or through other tests. Though no doubt a district court could find such evidence persuasive, the Cundiffs point to nothing—no expert opinion, no research report or article, and nothing in any of the various *Rapanos* opinions—to indicate that this is the sole method by which a significant nexus may be proved such that the district court's finding was inherently improper. So the district court properly concluded that the government passed Justice Kennedy's test.

The Plurality's test. Under this standard, the government must make two showings to establish jurisdiction: "First, that the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742.

The first question is whether the adjacent property contains a "water of the United States." The district court held that jurisdiction was proper under the plurality's standard because the South Channel (located on the northern tract of the wetlands), and Pond and Caney Creeks were all "relatively permanent bodies of water connected to a traditional interstate navigable water, the Green River." *Cundiff*, 480 F. Supp. 2d at 945. Regarding the South Channel, the district court found that the water flows through the channel into Pond Creek for all but a few weeks a year,

the two creeks are open waterbodies with significant flowing water, and that both flow into the Green River. (Pond Creek itself is navigable in part.) So the first prong of the plurality's test is met.

The second question is whether the wetlands possess a "continuous surface connection" with the Green River and its tributaries. The Cundiffs argue that, because the wetlands are at a different elevation level than the two creeks and it is not readily apparent that water perpetually flows between them, there is no continuous surface connection. The district court, observing that *Riverside Bayview* stated that it is often ambiguous where the transition between water and dry land exactly exists, 474 U.S. at 132, 135 n. 9, disagreed and held that a continuous surface connection existed. Specifically, the Court observed that the inquiry was whether it was ambiguous where land stopped and water began, because otherwise the plurality's recognition of these gradual transitions would be "completely eviscerat[ed]." *Cundiff*, 490 F. Supp. 2d at 947.

We agree; the Cundiffs' argument proves too much. Although the term "continuous surface connection" clearly requires surface flow, it does not mean that only perpetually flowing creeks satisfy the plurality's test. Indeed, the *Rapanos* plurality, in tipping its hat to *Riverside Bayview*, fashioned its test to determine when *wetlands* were "waters of the United States," and therefore implicitly recognized that wetlands are neither navigable-in-fact nor even literally bodies of water. Instead, wetlands are merely "inundated or saturated" soil that can "support . . . under normal circumstances . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R.

§ 328.3(b). In other words, the plurality's test requires a topical flow of water between a navigable-in-fact waterway or its tributary with a wetland, and that connection requires some kind of dampness such that polluting a wetland would have a proportionate effect on the traditional waterway. If the Cundiffs' restrictive version of the plurality's test was accurate, then the plurality could have saved itself time and effort by saying that wetlands could never be "waters of the United States" and overruled *Riverview Bayside*'s holding to the contrary. It did not do that; instead, the plurality went through a lengthy analysis and therefore the standard is broader than the Cundiffs assert.[5]

Further undermining their argument is the fact that the district court took note of the South Channel, which provides a largely uninterrupted permanent surface water flow between the wetlands and traditional waterways. The district court also found that the existence of additional (and substantial) surface connections between the wetlands and permanent water bodies "during storm events, bank full periods, and/or ordinary high flows" provides

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[5] Moreover, the Cundiffs' view that any interruption in flow means that jurisdiction under the plurality's test is improper would improperly exclude seasonal rivers and other such water bodies whose surface connection was not perpetual. At oral argument, the Cundiffs' counsel conceded that seasonal rivers and like water bodies would be covered by the plurality's test. *See Rapanos*, 547 U.S. at 732 n.5 (Scalia, J., plurality opinion) (observing that the Act's reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months") (emphasis in original).

additional evidence of a continuous surface connection. *Cundiff*, 480 F. Supp. 2d at 947. Finally, Cundiff personally went a long way towards creating a continuous surface connection when he dug or excavated ditches to enhance the acid mine drainage into the creeks and away from his wetlands; in determining whether the Act confers jurisdiction, it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was man-made or formed naturally. Thus, we affirm the district court's determination that the Act confers jurisdiction over the Cundiffs' wetlands because both tests are met.[6]

B. Summary Judgment Was Proper

To establish liability under the Act, the government must prove that (1) a person (2) discharged a pollutant (3) from a point source (4) into waters of the United States (5) without a permit. 33 U.S.C. §§ 1311(a), 1362(6), 1362(7), 1344(a), 1362(12). The Cundiffs do not contend that they are not persons (1), nor do they contend that no point source was involved (3), and we have already determined that the wetlands here are waters of the United States (4). The Cundiffs contend that they have not discharged any pollutants (2) and, while they concede that they did not have a permit

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[6] Because the Cundiffs failed to properly raise or develop their Commerce Clause challenge to jurisdiction under the Act—and such a challenge would be rather tenuous anyway, *see, e.g., Gonzalez v. Raich*, 545 U.S. 1 (2005); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326-27 (6th Cir. 1974); *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005)—this argument is waived.

from the Corps, they assert that their activities fell into one of the relevant exemptions (though not the "recapture" provision) and thus were not required to have one (5).[7]

1. Discharge of a pollutant

The Clean Water Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Pollutant" includes not only traditional contaminants like "radioactive" or "chemical waste," but also basic solids like "dredged spoil, . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6). Latching onto "addition," the Cundiffs argue that the regulation defining a pollutant to include "sidecasting" goes beyond the authority the Act grants. In other words, they argue that it is unreasonable for the agency to interpret "discharge of a pollutant" to cover situations not involving the introduction of foreign material into the area.

Sidecasting involves the addition of dredged or excavated dirt from a removal site (here, the ditches the Cundiffs dug), to some disposal site (here, the Cundiffs' own wetlands). Sidecasting's purpose is to fill

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[7] The Cundiffs also assert that Seth Cundiff should have been dismissed from the lawsuit because, while he unquestionably owned part of the wetlands, he had leased them back to his father, Rudy Cundiff, and only Rudy engaged in any of the disputed activities. This argument fails, however, because even though he leased his tract, Seth Cundiff both owned it and had knowledge of Rudy Cundiff's activities. So the district court did not abuse its discretion in denying the motion to dismiss Seth Cundiff from the lawsuit.

wetlands to dry them out. Although it is plausible to read "addition" as covering only completely foreign materials, that reading is foreclosed because "pollutant" is *defined* in the Act to specifically include "dredged spoil"—the Cundiffs would read that term out of the Act. Further, the Act is not concerned with mere "material," but instead with the addition of "pollutants"—material can be benign in one spot and seriously disruptive to the surrounding ecological system in another. As the Fourth Circuit has stated, once you have dug up something, it becomes

> "dredged spoil," a statutory pollutant and a type of material that up until then was not present [in the wetlands]. It is of no consequence that what is now dredged spoil was previously present on the same property in [a] less threatening form . . . . What is important is that once a material was excavated from the wetland, its redeposit in the same wetland added a pollutant where none had been before.

United States v. Deaton ("Deaton I"), 209 F.3d 331, 335 (4th Cir. 2000); *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 920-21 (5th Cir. 1983). And even if the statute was ambiguous on whether the prohibition on the "addition" of pollutants included sidecasting, it is nevertheless a reasonable agency interpretation and must be accorded deference. *Chevron*, 467 U.S. at 843.[8]

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[8] Although not cited by either party, it is arguable that *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988), would in some ways support the Cundiffs' assertion that sidecasting is beyond the agency's authority. In that case this Court upheld an agency determination by the EPA

The Cundiffs' other argument is that, if the regulations are nevertheless valid, then their dredging, filling, and mechanized landclearing activities nevertheless fall into the exception to the "discharge of dredged material" for "de minimis, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986), codified at 33 C.F.R. § 323.2(d) (1990). Although this argument was probably waived, *see Thurman v. Yellow Freight Sys.*, 97 F.3d 833, 835 (6th Cir. 1996), the assertion that the Cundiffs merely left some fallback incidental to ditch digging cannot be credited: they actively filled the wetlands with dredged spoil and covered roughly 5.3 acres of wetlands next to about 11,900 feet of ditches. This goes far beyond being "de minimis."[9] Thus, they discharged a pollutant under the Act.

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that the discharge of pollutants from one body of water to a contiguous one was not an "addition" because it did not add a foreign pollutant. But *Consumers Power* is distinguishable because it was about agency deference to the EPA's interpretation of "addition," *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 489-94 (2d Cir. 2001) (distinguishing *Consumers Power*)—indeed, the *Consumers Power* Court referred to the definition it was upholding as "circular." Moreover, *Consumers Power* was about normal dam operations that resulted in changes to water quality, while this case concerns a defendant who took proactive steps to purposefully alter and fill his wetlands.

[9] The current form of the regulations exclude "incidental fallback," 33 C.F.R. § 323.2(d)(3)(iii), and activities that do not have more than a "de minimis (i.e. inconsequential) effect on the area." *Id.* at § 323.2(d)(6). The Cundiffs' activities were neither "incidental" nor "inconsequential."

2. Permit requirement

Although the Cundiffs do not dispute that they did not have a valid section 404 permit when digging ditches and clearing their wetlands, they nevertheless argue that their activities fell into one of the statutory exemptions, though not into the "recapture provision." *See* 33 U.S.C. § 1344(f)(1)-(2). Specifically, the Cundiffs argue that their activities fall into either the farming exception, § 1344(f)(1)(A), or the drainage ditch maintenance exception, § 1344(f)(1)(C). "The defendants bear the burden of establishing both that they qualify for one of the exemptions of § 1344(f)(1) and that their actions are not recaptured by § 1344(f)(2)." *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 955 (7th Cir. 2004).

The farming exception exempts from the permit requirement the "discharge of dredged or fill material" from "normal farming, silviculture, and ranching activities." § 1344(f)(1)(A). As the statute and regulations both require, the disputed activities "must be part of an established (i.e., on-going) farming, silviculture, or ranching operation" and they cease to be "established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii). The Cundiffs' wetlands fail both requirements: before the Cundiffs took over and began their landclearing activities, the land had not been used as a farm for many decades prior and no one disputes that no farming could take place on the wetlands without significant changes—the entire point of Rudy Cundiff's activities was to significantly alter the wetlands to make them arable. Of course, such

activities are not universally impermissible, but they do require a permit. Thus the farmland exception does not apply.

Nor does the drainage ditch maintenance exception apply. Section 1344(f)(2)(C) exempts the discharge of dredged or fill material "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches." Note the difference in language between the two clauses: while the exemption applies to the maintenance *or construction* of farm or stock ponds or irrigation ditches, it only applies to the *maintenance* of drainage ditches and not their construction. The regulations make this explicit. 33 C.F.R. § 323.4(a)(3) (observing exemption for "the maintenance (but not construction) of drainage ditches"). The district court found that the Cundiffs' activities were not limited to merely maintaining existing and functioning ditches, but instead involved both digging brand new ones and excavating ditches that had no function or ability to function as drainage ditches, and neither can be considered mere "maintenance."

Even if the Cundiffs' activities fell within either the farming or drainage ditch maintenance exemptions, they would still have been required to get a permit under the "recapture provision," 33 U.S.C. § 1344(f)(2), which states that a permit is still required whenever a dredging activity has "as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and the "flow or circulation of navigable waters may be impaired or the reach of such waters reduced." *Id.* To fall within this provision, both elements must be met. *See Macklin*, 361 F.3d at 949. Here, Rudy Cundiff freely admitted that he excavated

the ditches to convert the wetlands into being suitable for crop production, and the method by which he attempted to do so—drying the wetlands out to transform them into farmland—obviously would, if successful, "impair[]" the "flow or circulation of navigable waters" or "reduce" their reach. 33 U.S.C. § 1344(f)(2). So, even if the Cundiffs' activities fell into one of the exemptions above, they still would have been required to have obtained a permit under the recapture provision. And because the government has thus satisfied its prima facie case against the Cundiffs by proving all five required elements, the district court properly granted summary judgment on their liability.

C. The District Court Did Not Abuse Its Discretion in Imposing Remedies

Remediation orders are reviewed for abuse of discretion. *See United States v. Norris*, 937 F.2d 286, 288 (6th Cir. 1991). Courts have considered three factors when evaluating remediation or restoration proposals: (1) whether the proposal would confer maximum environmental benefits, (2) whether it is achievable as a practical matter, and (3) whether it bears an equitable relationship to the degree and kind of wrong to be remedied. *United States v. Deaton ("Deaton II")*, 332 F.3d 698, 714 (4th Cir. 2003) (citing cases). Here, the district court analyzed each factor based on the evidence in rejecting the Cundiffs' proposals and accepting the government's proposed restoration plan. The government's plan consists primarily of filling in the ditches on the northern tract, cutting branches in the ditches on the southern tract to restore the wetlands, planting trees on the southern tract to replace the ones the Cundiffs removed, restoring previous plant and animal life, and placing

riprap (loose rocks assembled as a foundation) where the northern tract's ditches enter Caney Creek to prevent erosion. The Cundiffs' challenge to the district court's judgment is largely a quarrel with the court's factual findings, which were not clearly erroneous, though they also argue that the government's plan will not allow them to see sufficient future profits. The Cundiffs also claim that what they were already doing would have led to the restoration of the wetlands.

Taking this latter contention first, the district court flatly rejected it, finding instead that the government's plan would "confer maximum environmental benefits." And while the amount of money that the Cundiffs might receive in the future is generally included as a factor in equity, the court also found that the Cundiffs' violations were "intentional, flagrant, egregious, and openly defiant, so as to militate against any equitable considerations." J.A. 51-52. Thus, in light of these findings and the Clean Water Act's goal of "restoring and maintaing the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the district court did not abuse its discretion in entering the remediation order.

IV.

The Cundiffs' counterclaims are rather nebulous, but they roughly fall into three categories: (A) Constitutional takings-based counterclaims alleging that the government's actions constituted an uncompensated taking without due process; (B) duty-based counterclaims alleging that the federal government owed them a mandatory duty to mitigate damage to their property caused by the acid water runoff from the nearby abandoned mine; and (C)

tort-based counterclaims alleging liability for the government's failure to fix the acid mine runoff or for the government's conduct in enforcing the Act. Each fails as a matter of law.

A. Takings Counterclaims

The Cundiffs claim that the governments' actions—either because of the remediation plan or because of the mine's drainage onto the Cundiffs' property—constituted an uncompensated taking without due process under the Fifth Amendment. The merits of this argument are specious,[10] but this claim has a bigger problem: The Tucker Act gives the Court of Federal Claims exclusive subject matter jurisdiction over takings claims seeking more than $10,000. 28 U.S.C. § 1491. Although the Cundiffs are not clear about how much they exactly seek, they seek more than $10,000,000 altogether. And the Cundiffs never specifically refuted that this jurisdictional threshold applies, and thus their takings counterclaims were properly dismissed.

B. Mandatory Duty Counterclaims

The Cundiffs assert that the federal government owed them a mandatory duty to prevent or remediate runoff from the mine from seeping onto their property under the Surface Mining Control and Reclamation Act ("SMCRA"). *See* 20 U.S.C. § 1270. Although the

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[10] It is unlikely that a takings claim would succeed: the damage the Cundiffs complain of results from the acid mine drainage from the nearby abandoned mine, which is owned by some third party and has never been owned or operated by the federal government.

SMCRA grants a private right of action against the government for the failure to perform mandatory duties, *id.* at § 1270(a)(2); *see also* 5 U.S.C. § 702 (providing judicial review to persons who have suffered a legal wrong because of an agency action under the APA), it only authorizes abandoned mine reclamation activities on properties adversely affected by abandoned mines and "for which there is no continuing reclamation responsibility under State or other federal laws." *Id.* at § 1234. It furthermore envisions that—while paid for by fees collected from current mine operators—the mine reclamation projects will be undertaken by *state* governments. *See id.* at § 1201(f). When a state submits a mine reclamation program consistent with the SMCRA, that state is given the "exclusive responsibility and authority" to implement it. *Id.* at § 1235(d). Kentucky has an approved reclamation program, so the responsibility and authority over remediating pollutants that drain out of abandoned coal mines like the one near the Cundiffs' property does not lie with the federal government. Thus, the Cundiffs' mandatory duty counterclaims were properly dismissed.

C. Tort Counterclaims

The Federal Tort Claims Act confers jurisdiction on federal courts to hear cases only "under circumstances where the United States, if a private person, would be held liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Tort Claims Act thus neither *creates* causes of action against the United States nor provides a means of enforcing federal statutory duties. Rather, it "constitutes consent to suit and is fundamentally limited to cases in which a private

individual [would be liable] under like circumstances." *Myers v. United States*, 17 F.3d 890, 894 (6th Cir. 1994). To succeed, the Cundiffs must therefore show that they have pleaded facts by which a private individual would be liable under Kentucky law. They have not.

The gravamen of the Cundiffs' argument is that the abandoned coal mine seeps acid water onto their property so the United States should be liable. But, as observed above, the United States has never owned nor operated that mine, and there is no cognizable legal theory in Kentucky by which someone could be sued for failing to stop fluid from draining out of some third-party's abandoned coal mine. Insofar as the Cundiffs assert that though a private individual would not be liable yet nevertheless the federal government should be, the response is two-fold. First, Kentucky has never recognized such a lawsuit, and, second, there cannot be a universal common-law duty on the federal government to clean up anything and everything that adversely affects someone's property, even when caused by third-parties. Although the Cundiffs cite a plethora of cases where liability attached, *see, e.g.*, *City of Ashland v. Smith*, 340 S.W.2d 208 (Ky. 1960); *Louisville & Nashville R.R. v. Bush*, 336 S.W.2d 578 (Ky. 1960), *Cissell v. Grimes*, 383 S.W.2d 128 (Ky. 1964), in each the liable party either owned the source of the problem or affirmatively created it. Neither is the case here. Thus, the district properly dismissed the tort counterclaims.

V.

We AFFIRM the district court's grant of summary judgment to the government and assignment of

penalties to the Cundiffs, along with the district court's dismissal of the Cundiffs' counterclaims against the government.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO. 4:01CV-6-M

[Filed March 29, 2007]

UNITED STATES OF AMERICA PLAINTIFF	)
vs.	)
GEORGE RUDY CUNDIFF and CHRISTOPHER SETH CUNDIFF DEFENDANTS	)

MEMORANDUM OPINION

This matter is before the Court for a determination of whether the wetlands at issue in this litigation constitute "waters of the United States" under the Clean Water Act. On January 25, 2007, the Court conducted an evidentiary hearing on this issue. The parties have filed post-hearing briefs [DN 170, DN 171]. Fully briefed and argued, this matter is ripe for decision.

I. BACKGROUND

This civil enforcement action arises out of violations of Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), by Defendants George Rudy Cundiff and his son, Christopher Seth Cundiff. Defendants own two adjacent tracts of land in Muhlenberg County, Kentucky. Defendants' properties are situated adjacent to Pond and Caney Creeks, tributaries of the Ohio River via the Green River. By Memorandum Opinion and Order entered on April 28, 2003, the Court granted the United States' Motion for Summary Judgment, holding that Defendants violated Section 301(a) of the Clean Water Act ("CWA"). In January of 2005, after a three-day remedy bench trial, the Court permanently enjoined Defendants from discharging dredged or fill material or any other pollutants into waters of the United States, except in compliance with the CWA. The Court imposed a civil penalty of $225,000 but suspended $200,000 pending Defendants' adequate implementation of the United States' restoration plan. The $25,000 was ordered to be paid in equal installments over five years.[1] Defendants appealed the judgment to the United States Court of Appeals for the Sixth Circuit.

On June 19, 2006, the United States Supreme Court issued a decision in Rapanos v. United States, 547 U.S. ___, 126 S.Ct. 2208 (2006). The opinion addressed the meaning of the phrase "waters of the

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[1] Additional information regarding the factual and procedural history of this case is set forth in the Findings of Fact and Conclusions of Law issued on January 10, 2005 [DN 111].

United States" in the CWA and accompanying regulations. The parties jointly moved for a limited remand from the Sixth Circuit Court of Appeals so that this Court could address whether the wetlands at issue in the present case are "waters of the United States" in light of Rapanos. On September 29, 2006, the Sixth Circuit remanded the case for consideration of that question.

Defendants contend that under the new standard articulated in Rapanos the wetlands at issue do not qualify as "waters of the United States" and, therefore, the United States lacks jurisdiction over the site. The United States disagrees arguing that its exercise of jurisdiction over the wetlands at the site is proper because the wetlands constitute "waters of the United States" under the meaning of the Clean Water Act, the applicable regulations, and the Rapanos decision.

II. LAW

A. Overview of Rapanos v. United States

The Clean Water Act prohibits "the discharge of any pollutant by any person" except provided in the Act. 33 U.S.C. § 1311(a). "Discharge of pollutants" encompasses "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Navigable waters," in turn, is defined as "waters of the United States . . . ." 33 U.S.C. § 1362(7). In interpreting the CWA, the Environmental Protection Agency and the Army Corps of Engineers "have issued regulations extending CWA jurisdiction to waters used in interstate commerce, tributaries of waters used in interstate commerce, and wetlands adjacent to either waters used in interstate

commerce or to the tributaries of such waters." United States v. Evans, 2006 WL 2221629, *16 (M.D. Fla. Aug. 2, 2006); 33 C.F.R. § 328.3; 40 C.F.R. § 122.2. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001).

In light of the EPA and the Corps interpretation of CWA jurisdiction, the Supreme Court in Rapanos v. United States, 126 S.Ct. 2208 (2006), addressed the proper interpretation of the phrase "waters of the United States" and the corresponding scope of the Corps jurisdiction under the Clean Water Act. Rapanos involved two consolidated cases from the Sixth Circuit. In one case, the United States brought an enforcement action alleging that property owners and their affiliated businesses deposited fill materials into wetlands without a permit in violation of the CWA. See United States v. Johnson, 467 F.3d 56, 59 (1st Cir. 2006)(citing Rapanos, 126 S.Ct. at 2219). In the other, property owners "were denied a permit to deposit fill material in a wetland located on a . . . parcel of land about one mile from [a lake]" and, after exhausting their administrative appeals, they filed suit. Rapanos, 126 S.Ct. at 2219; Johnson, 467 F.3d at 59.

The district court found that there was federal regulatory jurisdiction over the sites in question. The Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at the sites because "'there were hydrological connections between [the] sites and corresponding adjacent tributaries of navigable waters.'" Rapanos, 126 S.Ct. at 2219 (citing Rapanos, 376 F.3d 629, 643 (2004)). The Supreme

Court then consolidated the cases and granted certiorari to decide whether these wetlands constitute "waters of the United States" under the Clean Water Act. Id. at 2220.

The Court issued a split decision, 4-4-1, construing the phrase "waters of the United States" as used in the Clean Water Act. Justice Scalia writing for the plurality concluded that the phrase "waters of the United States" includes only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" Id. at 2225. "The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. For purposes of determining federal regulatory jurisdiction over wetlands, the plurality held that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." Id. at 2226 (emphasis in original). See also Johnson, 467 F.3d at 59. Thus, under the plurality's standard, establishing that wetlands are covered by the Clean Water Act requires two findings: "First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Rapanos, 126 S.Ct. at 2226-27 (citations omitted)). The plurality vacated the decision of the Sixth Circuit and, noting "the paucity of the record,"

remanded for further proceedings. Id. at 2235; Johnson, 467 F.3d at 59.

Justice Kennedy concurred in the judgment, but rejected the plurality's rationale. Id. Instead, he concluded that the government's jurisdiction under the Clean Water Act extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Id. at 2236. Specifically, Justice Kennedy held that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Id. at 2248. Under this standard, "[w]here the wetlands in question are 'adjacent to navigable-in-fact waters, [the government] may rely on adjacency to establish its jurisdiction.' . . . Where the wetlands are adjacent to nonnavigable tributaries, '[a]bsent more specific regulations . . . [the government] must establish a significant nexus on a case-by-case basis.'" Johnson, 467 F.3d at 59 (quoting Rapanos, 126 S.Ct. at 2249)).

Writing for the four dissenting justices, Justice Stevens would have upheld the EPA's and the Corps' interpretation of "waters of the United States" in its entirety. Justice Stevens held that any "significant nexus" requirement of the Clean Water Act "is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries." Rapanos, 126 S.Ct. at 2264 (citing Riverside Bayview, 474 U.S. at 123). In light of the plurality and concurring decisions, Justice Stevens suggested that the Corps' jurisdiction

would extend to cases "in which either the plurality's or Justice Kennedy's test is satisfied . . . ." Id. at 2265. See also Johnson, 467 F.3d at 60; Evans, 2006 WL 2221629,*19.

B. The Controlling Standard

The United States argues that the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies either the plurality's standard or Justice Kennedy's standard in Rapanos. Relying on Marks v. United States, 430 U.S. 180 (1977), the Defendants disagree arguing that the plurality decision controls. Under the holding in Marks, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks, 430 U.S. at 193.

While the Sixth Circuit has not yet addressed which standard governs, other Court of Appeals have addressed this issue. Relying on Marks, both the Ninth Circuit and the Seventh Circuit concluded that Justice Kennedy's concurrence actually provides the controlling test. Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)(significant nexus test set forth in Justice Kennedy's concurrence is controlling); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006)(noting that the narrowest opinion is Justice Kennedy's concurrence which is the least restrictive of federal authority to regulate). By contrast, the First Circuit concluded that the United States could assert jurisdiction over the sites in question if the

Government meets either Justice Kennedy's standard or that of the plurality. Johnson, 467 F.3d at 60. The First Circuit noted that the Supreme Court has moved away from the Marks formula and has indicated "that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." Id. at 65 (citing Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the test that lower courts should apply); League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2607 (2006) (Kennedy, J.) (analyzing Vieth v. Jubelirer, 541 U.S. 267 (2004) to find that agreement among one concurring and four dissenting Justices establishes majority support for a legal proposition); Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001) (Scalia, J.) (noting the agreement of five Justices who joined plurality and various dissenting opinions)). See also United States v. Evans, 2006 WL 2221629 (M.D. Fla. August 2, 2006). Significantly, in accordance with this case law, the four dissenting Justices in Rapanos stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either the plurality's standard or Justice Kennedy's standard is satisfied. Rapanos, 126 S.Ct. at 2265 and n.14.

After a review of the case law, the Court adopts the First Circuit's approach and concludes that the United States may establish jurisdiction over the Cundiff site if it can meet either Justice Kennedy's or the plurality's standard as set forth in Rapanos.

III. DISCUSSION

A. Justice Kennedy's Standard – The Significant Nexus Test

Under the significant nexus test as defined by Justice Kennedy in his concurrence, the party seeking to invoke jurisdiction under the Clean Water Act must present evidence that the wetlands in question "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Rapanos, 126 S.Ct. at 2236. According to Justice Kennedy, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Id. at 2248. In contrast, "[w]hen . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Id. The United States must establish a significant nexus on a case-by-case basis. See Johnson, 467 F.3d at 59 (quoting Rapanos, 126 S.Ct. at 2249)).

After a review of the testimony and the expert reports, the Court finds that a significant nexus exists between the wetlands in question and the traditional navigable-in-fact water – the Green River. Dr. Lyndon C. Lee, a professional wetland scientist, testified that the wetlands on the Cundiff site perform significant functions that directly, indirectly, and cumulatively contribute to, enhance, and affect the physical, chemical, and biological integrity of Pond

Creek, Caney Creek, and the Green River. Dr. Lee opined that the wetlands on the Cundiff site serve several important ecological functions including both temporary and long term water storage, the filtering of acid mine drainage and sediment, and habitat support for plant and wildlife species that are endemic to wetland ecosystems. (Lee Report at i, 7-8.)

Specifically, Dr. Lee testified that Rudy Cundiff's unauthorized ditch construction, mechanical land clearing and filling of the wetlands at the site have diminished the capacity of the wetlands in question to store water. According to Dr. Lee, this reduction affects the frequency and extent of downstream flooding, increases the flood peaks in the Green River, and, in turn, "impact[s] navigation, crop production in bottomlands, downstream bank erosion and sedimentation." (Lee Report at 7.)

Additionally, Dr. Lee and Ed Carroll, Environmental Control Supervisor with the Kentucky Division of Water, testified that they observed acid mine drainage and sediment flow onto the Cundiff property from upstream sites. Mr. Carroll testified that the wetlands in question, along with other surrounding wetlands, perform vital filtering and sediment trapping functions which treats pollutants, contaminants, and toxins and affect the overall water quality of the Green River. According to Mr. Carroll, Pond Creek has been channelized by the unauthorized activities of the Cundiffs thereby causing the acid mine drainage to bypass the wetlands in question and move quickly into Pond and Caney Creek and the Green River. (See Aeriel Video Tape, Carroll Dep. Exhibit A.)

When the acid mine drainage and associated sediments move too quickly downstream in the

Pond/Caney Creek system to the Green River, "there are direct and significant impacts to navigation (via sediment accumulation in the Green River) and to aquatic food webs . . . that are not adapted to thrive in acid waters and/or sediment-choked environments in the Green River." (Lee Report at 8.)

The Court credits the testimony of Plaintiff's experts and finds that the Cundiff wetlands, alone and in combination with other area wetlands, "significantly affect the chemical, physical, and biological integrity" of the Green River. Rapanos, 126 S.Ct. at 2248. For these reasons, the Court concludes that the wetlands at the Cundiff site are "waters of the United States" under the standard articulated by Justice Kennedy in Rapanos.

B. Plurality's Standard

Although the United States has satisfied Justice Kennedy's significant nexus standard, the Court will address the facts in light of the plurality's standard as well. Under the plurality's standard, establishing that wetlands are covered by the Clean Water Act requires two findings: "First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Rapanos, 126 S.Ct. at 2227. After an examination of the expert testimony and reports, the Court concludes that the wetlands at the site are "waters of the United States" as defined by the standard articulated by the plurality in Rapanos.

First, Dr. Lee and Mr. Carroll presented undisputed testimony that the South Channel located on the northern tract, Pond Creek, and Caney Creek are relatively permanent bodies of water connected to a traditional interstate navigable water, the Green River. Dr. Lee presented an aerial photograph of the site depicting the water flow. With respect to the South Channel, Dr. Lee testified that water flows eastward through the South Channel into Pond Creek for all but a few weeks in a year of average rainfall. (Lee Hearing Testimony.) With respect to Pond Creek and Caney Creek, Dr. Lee and Mr. Carroll introduced maps, historical aerial photographs, and an aerial videotape reflecting that Pond Creek and Caney Creek are open waterbodies with significant quantities of flowing water. Additionally, Dr. Lee testified that on October 25, 2006, he along with two other persons navigated Pond Creek from one mile upstream of the site, past the eastern boundary of the site, and then to the Green River. The approximately 11-mile trip took place "at a time when discharge volumes in the Pond Creek system and its tributaries were at near seasonal low discharge." (Lee Report at 6.) Given this evidence, clearly the portions of Pond Creek and Caney Creek that connect the Cundiff wetlands to the Green River, as well as the South Channel, are "relatively permanent, standing or continuously flowing bodies of water," and therefore satisfy the first element of the plurality's standard. Rapanos, 126 S.Ct. at 2225.

Second, since the Court determined that Pond Creek, Caney Creek, and the South Channel are "waters" as defined above, the Court must next determine "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the

boundary-drawing problem [the Supreme Court] addressed in *Riverside Bayview*." Rapanos, 126 S.Ct. at 2235.

Defendants maintain that the continuous surface connection requirement is not satisfied where the water level of the alleged wetland is at a different level than that of the creeks. The Court finds Defendants' interpretation of the continuous surface connection element to be incorrect. In discussing the boundary drawing problem, the Rapanos plurality noted that in Riverside Bayview the Supreme Court had acknowledged that there was an inherent ambiguity in drawing the boundaries of any "waters":

> [T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs-in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.

Rapanos, 126 S.Ct. at 2225 (quoting Riverside Bayview, 474 U.S. at 132.) According to the Rapanos plurality, because of this inherent ambiguity, the Supreme Court in Riverside Bayview "held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters." Id. (citing Riverside Bayview, 474 U.S. at 132, 135, & n. 9). Given this discussion of

Riverside Bayview, Justice Scalia clearly did not intend that the water level of the wetland and the covered "waters" must be completely level. Such a conclusion would completely eviserate the plurality's recognition that a gradual transition can exist from water to land, *e.g.*, shallows, marshes, mudflats, swamps, bogs-in short. Id. at 2225 (Riverside Bayview, 474 U.S. at 132).

After a review of the record, the Court concludes that the wetlands at the Cundiff site have a continuous surface connection with Pond Creek, Caney Creek and the South Channel making it difficult to determine where the water ends and the wetland begins. The Plaintiff's experts testified that there are no clear demarcation between waters and wetlands at the Cundiff site. In fact, a review of the expert testimony, aerial maps, aerial video, along with photographs introduced at the hearing, confirm that the wetlands at the site physically abut the South Channel, Pond Creek, and Caney Creek.

Additionally, there are several locations in the northern and southern tracts where Pond and Caney Creek and the Cundiff wetlands have a continuous surface connection during significant storm events, bank full periods, and/or at ordinary high flows. The record reflects that water flows between the wetlands and Pond and Caney Creek through such conduits as an inadequately armored bank of Caney Creek at the location of the former western ditch, a rock-stabilized cut and swale at Caney Creek near the center of the northern tract, excavated swales along the eastern bank of the northern tract at Pond Creek, and a rock ramp/swale system in the northeastern corner of the southern tract at Pond Creek. Furthermore, during

flood stage, over bank flooding creates numerous surface water connections between Pond Creek and Caney Creek and the wetlands. Dr. Lee also testified that the Cundiff wetlands are connected by a permanent surface water flow to Pond Creek via a deep ditch [Southern Channel (the North Tract-South Ditch in Figure 10)] that passes through the wetlands on the south side of the northern tract. According to Dr. Lee, the surface water continuously flows from the wetlands into Pond Creek from a discharge point in this ditch located at the southeast corner of the northern tract. Further, Dr. Lee stated that because the site is nearly level, flood waters from the northern tract also back flow south through a 36-inch iron culvert cut between the north and south tracts.

For these reasons, the Court finds that the Cundiff wetlands are covered "waters of the United States" as defined by the plurality standard in Rapanos.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that the wetlands at issue in this litigation constitute "waters of the United States" under the Clean Water Act as defined by both Justice Kennedy's test and the plurality's test; and thus, the United States properly exercised jurisdiction over the site.

/s/
Joseph H. McKinley, Jr., Judge
United States District Court

March 29, 2007

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NO. 4:01CV-6-M

[Filed January 10, 2005]

UNITED STATES OF AMERICA PLAINTIFF	)
vs.	)
GEORGE RUDY CUNDIFF and CHRISTOPHER SETH CUNDIFF DEFENDANTS	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This civil enforcement action arises out of violations of Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), by Defendants George Rudy Cundiff and his son, Christopher Seth Cundiff. The United States seeks injunctive relief and civil penalties against the Defendants for the discharge of fill materials into the waters of the United States without the required permit from the United States Army Corp of Engineers. By Memorandum Opinion and Order entered on April 28, 2003, the Court granted the

United States' Motion for Summary Judgment, holding that Defendants violated Section 301(a) of the Clean Water Act. The current issue before the Court is the appropriate civil penalty for Defendants' violations of the Clean Water Act and the nature of the injunctive relief. The Court conducted a bench trial on these issues between August 30, 2004 and September 1, 2004. The parties have filed proposed findings of fact and conclusions of law [DN 109 , DN 110]. After fully considering the evidence and the arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

I. BACKGROUND

Defendants George Rudy Cundiff ("Cundiff") and his son, Christopher Seth Cundiff (collectively "Defendants"), own two adjacent tracts of land in Muhlenberg County, Kentucky. Defendants' properties are situated adjacent to Pond and Caney Creeks, tributaries of the Ohio River via the Green River. In May 1990, Cundiff purchased the "southern tract." At that time, the southern tract contained approximately eighty-five (85) acres of wetlands and a non-wetland ("upland") area on which the Cundiff residence is situated. Portions of the property contained orange-colored water which was drainage from mining activity that had been conducted on adjacent and nearby properties. Many people in the community considered the property an eyesore because the stagnant, discolored water from the mine provided an ideal breeding ground for mosquitos. Cundiff was aware of the wet conditions and the mine drainage when he purchased the property. Cundiff purchased the property intending to farm the land, and soon

began excavating drainage ditches and clearing trees in an effort to make the property fit for agricultural use.

In October of 1991, federal and state officials, including Richard Funk of the United States Army Corps of Engineers (the "Corps") and Jerry Sparks of the Kentucky Division of Water ("KDOW"), observed ditches, the filling of wetlands, and mechanical land clearing on the property. KDOW suspected possible Clean Water Act ("CWA") wetlands violations – namely, failure to obtain the requisite permit from the Corps pursuant to Section 404 of the CWA. An inspection of the site revealed that Cundiff had excavated ditches through the wetlands and placed the dredged material into the wetlands, an activity known as "sidecasting." Cundiff did not have a permit from the Corps to place the dredged material in the wetlands. Following the inspection, the Corps sent Cundiff a cease-and-desist letter "specifically prohibiting any further activity involving the placement of excavated or fill material into these jurisdictional wetlands" without a permit from the Department of the Army. (Letter from the Corps to Cundiff of 10/22/91, Exhibit PX-8). The letter attached a copy of Section 404 of the Clean Water Act, which requires a permit for the discharge of dredged or fill material into wetlands.

During the spring and summer of 1992, federal and state officials met with Cundiff to create a plan to restore the wetlands. However, no agreement was reached. Cundiff insisted on converting the wetlands into farmland. Cundiff subsequently failed to comply with the Corps' Cease-and-Desist Order and continued to drain and clear the property. Because of the flagrant

violations, the Corps referred the matter to the United States Environmental Protection Agency ("EPA"). Over the next several years, Cundiff took no action to restore the wetlands despite repeated governmental directions to do so. In 1997, Cundiff planted wheat on a portion of the southern tract. During an inspection, officials observed the discing and a ring of downed trees on the southern tract. Cundiff did not have a permit from the Corps to engage in this activity which again involved the discharge of dredged material into the wetlands on the southern tract. Following this inspection, the EPA issued an Order of Compliance, Administrative Order No. 404-98-02, which informed Cundiff that he had violated Section 301(a) of the Clean Water Act by causing the unauthorized deposition of fill material into waters of the United States. The Order of Compliance directed Cundiff to "immediately cease participating in or causing any additional discharges into the Discharge Area of any 'pollutant' as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6)." (EPA Compliance Order of 10/16/97, Exhibit PX-23). Cundiff again failed to comply.

In June 1998, Cundiff's son, Seth Cundiff, purchased the "northern tract" which contains approximately 103 acres of wetlands.[1] Soon thereafter, Cundiff began excavating and clearing that property as well. Seth Cundiff knew that his father was excavating the ditches on the northern tract but did nothing to stop him from doing so. During a site visit

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[1] While title to the northern tract is held by Seth Cundiff, he leases back the property to his father, Rudy Cundiff, for the exact amount of the mortgage payment. Thus, it appears that Seth Cundiff is an owner in name only.

on October 14, 1998, EPA enforcement official Mike Wylie advised Cundiff that he needed a permit from the Corps for this work. Cundiff replied that he knew that a permit was required, but that the Corps would not grant him a permit so he dug the ditches anyway. Ignoring Wylie's warning, Cundiff continued work on a 200-foot ditch eventually extending it to Caney Creek. The dredged material was sidecast into the wetlands. In January of 1999, KDOW advised Cundiff that his excavation of the two ditches on the northern tract constituted a violation of state laws prohibiting the degradation or elimination of wetland areas without proper authorization from KDOW. KDOW also directed Cundiff to submit "a plan and schedule for the restoration of the wetland." (Exhibit PX-35). Cundiff failed to comply.

In June 1999, the EPA issued additional Orders of Compliance (Administrative Orders CWA-04-99-1015 and CWA-04-99-1016) to both Defendants requiring them to cease their excavation activities and "restore the two unauthorized ditches . . . by refilling them to their former elevation with the adjacent sidecast dredged material within 30 days . . . ." (EPA Compliance Orders of 06/23/99; Exhibit PX-41 ¶ 13; PX-42 ¶ 12). Defendants did not comply with the EPA's Orders of Compliance.

II. DAMAGE TO THE WETLANDS

Dr. Thomas E. Heineke, a private wetland consultant, testified that the unauthorized ditch construction and mechanical land clearing, along with the sidecasting of dredged and/or fill material into the wetlands, has adversely affected the functions of the wetlands. Dr. Heineke opined that Defendants'

unauthorized activities have reduced the amount of time that water ponds on the site, resulting in a loss of wildlife habitat, an increase in the amount of sediment export from the site, a decrease in flood water storage, a decrease in organic carbon export, a removal of the characteristic plant communities on the southern tract, and a reduction in the removal of elements and compounds from water entering the site. (Exhibit PX-1 at 9; Wayne Davis Trial Testimony).

According to Dr. Heineke, Defendants' activities, particularly the construction of the western ditch on the northern tract, have massively reduced the ability of the wetlands to perform the function of filtering and treating pollutants, contaminants, and toxins before they enter the groundwater and nearby waterways. The ditches prevent the wetlands from collecting the acid mine drainage that enters the property and neutralizing the contaminants in that runoff. As a result of these ditches, the acid mine drainage bypasses the wetlands and goes directly into Caney Creek, causing damage to the creek and to downstream waters and property. (See Exhibit PX-124). Additionally, Dr. Heineke testified that the bottomland hardwood wetland forest which was located on the southern tract and its entire wetland habitat have been essentially destroyed by Cundiff's activities. The Court credits the testimony of Plaintiff's experts and finds that the Defendants' unlawful activities adversely affected the functions of the wetlands and increased the amount of sediment and pollutants leaving the site.

III. REMEDY

A. PERMANENT INJUNCTION

The Clean Water Act authorizes district courts to issue appropriate injunctive relief for certain violations of the Act. See 33 U.S.C. § 1319(b). In light of the violations of the Clean Water Act, as determined in the Court's Memorandum Opinion and Order of April 28, 2003, and the documents and testimony admitted into evidence at the remedy trial, Defendants are permanently enjoined from discharging or causing the discharge of dredged or fill material or any pollutants into any waters of the United States except in compliance with the Clean Water Act.

B. RESTORATION INJUNCTION

The Plan

The United States tendered a proposed Wetland Restoration Plan ("restoration plan") prepared by Dr. Thomas Heineke in February of 2004. (Exhibit PX-1). The stated purpose of the restoration plan is to restore a forested wetland to the southern tract and to restore the hydrology on the northern tract to its pre-violation condition. (Exhibit PX-1). With respect to the southern tract, the restoration plan involves the cutting of three-foot-wide breaches through the piles of dredged material along the ditches on the southern tract every fifty feet. Dr. Heineke testified that the cutting of gaps into the berms of the ditches on the southern tract is designed to strike an appropriate balance between maintenance of wetlands hydrology while preventing prolonged ponding that would harm the growth of the new trees. (Exhibit PX-1 at 10 ¶ 1). In addition, Dr.

Steven Chipps, the Plaintiff's aquatic ecology expert, testified that by cutting gaps into the berms of the ditches, mosquitofish and other fish that prey on mosquitos would be able to expand their territory.

Additionally, the restoration plan calls for the planting of hardwood wetland tree species on nearly all of the jurisdictional wetlands on the southern tract. (Exhibit PX-1 at 10). The restoration plan suggests six types of hardwood trees that are particularly suitable for planting: pecan, green ash, swamp chestnut oak, cherrybark oak, pin oak, and bald cypress. (PX-1 at 11). The plan contemplates the planting of 400 seedling trees per acre. (Heineke Trial Testimony).

With respect to the northern tract, the restoration plan calls for the filling of the ditches by using the material that had been excavated from those areas. This would permit the acid mine drainage to "fan out" across the northern tract. The acid mine drainage would not spread to the southern tract because Cundiff has channeled the flow of the acid mine drainage so that it will remain on the northern tract. (Mike Wylie Trial Testimony). Furthermore, riprap or other similar material would be placed at the points where the northern tract ditches enter Caney Creek. This measure is intended to prevent further erosion of the banks of the creek. (Exhibit PX-1 at 10 ¶ 4).

The restoration plan sets objectives to be achieved within fixed time periods. (Exhibit PX-1 at 12). These objectives include: (1) a 75% survival rate of the total amount of the planted trees for five successive years; (2) adequate understory and ground cover to be established within five years; (3) a goal of more than 50% of all sampled vegetation to be "facultative . . . or

wetter"; (4) a minimum woody plant stem count of 300 per acre, until the canopy cover is at least 30%; and (5) the maintenance of wetland hydrology. (Id.). To ensure that the restorative measures are implemented, the restoration plan calls for a professional wetland scientist or other qualified ecologist to monitor the site and send annual reports to the EPA for five years. The reports will contain the information that will enable the EPA to evaluate the progress of the wetland, including photographs, a listing of invading plant species, details of the survival of the planted trees, and changes in vegetational composition. (Exhibit PX-1 at 12-13).

Defendants would be required to fund the restoration plan in its entirety, including the costs of a professional wetland scientist or other qualified ecologist to satisfy the annual reporting requirement. (Exhibit PX-1 at 13-14).

The Standard

In determining whether a restoration injunction is appropriate, the Court must examine whether the plan confers "maximum environmental benefits," (2) whether the plan is "achievable as a practical matter," and (3) whether the plan bears "an equitable relationship to the degree and kind of wrong it is intended to remedy." United States v. Deaton, 332 F.3d 698, 714 (4th Cir. 2003), cert. denied, 124 S.Ct. 1874 (2004); see also United States v. Norris, 937 F.2d 286, 288 (6th Cir. 1991); United States v. Smith, 149 F.3d 1172, 1998 WL 325954 (4th Cir. June 18, 1998).

First, the Court finds that the restoration plan will confer substantial environmental benefits. The

wetlands as they previously existed served various functions including flood water control, habitat sites for wildlife, and filtration and treatment of pollutants, contaminants, and toxins before they enter the groundwater and nearby waterways. The plan will restore the wetland functions that were lost or diminished as the result of Defendants' unauthorized activities. For instance, filling the ditches on the northern tract will restore the wetland hydrology, including the filtration and treatment of pollutants. Planting of the hardwood wetland trees on the southern tract will help restore the pre-existing plant and animal communities.

Second, the Court finds that the restoration plan is achievable as a practical matter. The work to be done is minimal and affordable. The plan contemplates that Cundiff will be able to cut the breaches, fill the ditches, armor the riverbanks, and remove the dredge piles by himself with equipment that is readily available to him. Defendants have presented no evidence to indicate that the restoration plan is not achievable.

Third, the Court finds that the restoration plan bears an equitable relationship to the degree and kind of wrong to be remedied. Cundiff's activities have adversely affected the functions of the wetlands and have increased the amount of sediment and pollutants flowing into Pond and Caney Creeks. Cundiff has been repeatedly warned that placing additional fill in the wetlands would require a permit. In fact, Cundiff continued to fill the wetlands after he was issued a cease-and-desist order in 1991. Cundiff's violations are "'intentional, flagrant, egregious, and openly defiant,' so as to militate against any equitable considerations." Smith, 1998 WL 325954, *4.

Defendants argue that this restoration plan does not take into consideration any possible adverse affects on the neighbors, high school or neighboring community. The Court credits the testimony of the Defendants and Defendants' neighbors regarding the condition of the mosquito problem in the area prior to 1992 and that Cundiff's excavation of drainage ditches and filling of the wetlands on the southern tract helped eradicate the problem. However, there is no indication in the record that the same result could not have been achieved without destroying the wetlands. Furthermore, contrary to Defendants' arguments, expert testimony at trial indicates that the implementation of the restoration plan should not increase the number of mosquitos at the site. (Chipps Trial Testimony). Dr. Steven Chipps testified that a vibrant wetland enhances the habitat for numerous predators of mosquitos and mosquito larvae, such as dragonflies and mosquitofish, which are already present at the site.

Defendants also argue that the restoration plan is too restrictive. As an alternative to filling the ditches on the northern tract, Defendants suggest installing a tiered filtering pond, lined with limestone to filter the mine drainage water. Additionally, Defendants complain that planting all of the southern tract in hardwood trees will not provide adequate income to the Defendants. Defendants contend that they should be given several years to see if they can raise cattle and/or hay on their properties. Defendants objections to the restoration plan are not well taken. The Defendants failed to present an alternative restoration plan or any expert testimony at trial either challenging the specifics of the plan offered by the United States or supporting the alternatives now suggested by the

Defendants. The purpose of the Clean Water Act "is to restore and maintain the integrity of the nation's waters." Smith, 1998 WL 325954, *4 (citing 33 U.S.C. § 1251(a)). Permitting the Defendants to alter the characteristics of the wetlands in order to raise cattle or hay will not permit the wetlands to function in the same way as they did prior to Cundiff's illegal activity. Restoration of property "is necessary to restore the wetlands to their natural and functional hydrology and therefore fulfill a central purpose of the Act." Id.

For these reasons, the Court adopts the Wetland Restoration Plan proposed by Dr. Thomas Heineke. Defendants are required to implement and fund the restoration plan outlined in Dr. Thomas Heineke's February 2004 report. (Exhibit PX-1).

C. CIVIL PENALTY

The United States requests a civil penalty in the amount of $225,000.00 be assessed against Defendant, George Rudy Cundiff, pursuant to 33 U.S.C. § 1319(d). The Government has not requested a civil penalty be assessed against Defendant, Seth Cundiff. This Court has wide discretion in assessing the penalty, up to the statutory maximum of $25,000.00 per day. Section 1319(d) of the Clean Water Act sets forth the factors relevant to the determination of the amount of a civil penalty:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic

impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

First, the Court finds that the violations committed by Cundiff are serious. Evidence at trial indicates that Cundiff's activities significantly impaired the property's wetland functions such as water filtration and sediment removal which in turn directly influenced the quality of Pond and Caney Creeks. Additionally, Cundiff's activities reduced and/or eliminated animals and plants associated with wetland habitats. Second, the Court finds that Cundiff's motive in filling the wetlands was to raise cattle or crops on the land. Therefore, Cundiff hoped to derive an economic benefit from the filling of the wetlands. Third, the violations committed by Cundiff have been continuous since 1991. Each day that the unlawful fill remains in place constitutes a separate violation. See, e.g., Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647, 650 (6th Cir. 1994).

Fourth, the Court finds that Cundiff did not make a good-faith effort to comply with the applicable legal requirements. For over 13 years, Cundiff has failed to comply with the orders of the Corps, KDOW, and EPA. Cundiff flagrantly disregarded the October 22, 1991, cease-and-desist order; the EPA's October 16, 1997 Order of Compliance; the KDOW's January 29, 1999, violation letter; and the EPA's June 23, 1999, Order of Compliance. Additionally, Cundiff has been repeatedly informed by both federal and state officials that his conduct was in violation of the Clean Water Act and that he was not permitted to excavate ditches through the wetlands and place the dredged material into the

wetlands without a permit from the Corps. Cundiff continues to adamantly refuse to comply with federal and state law and insists that he should be allowed to alter the wetlands in order to grow crops or raise livestock. This position is unacceptable. When Cundiff purchased the southern tract in 1990, he was aware of both the standing water on the property and of the acid mine drainage. And significantly, as early as 1991, he was aware that his activity was in violation of both state and federal law. Cundiff has repeatedly defied the express orders and warnings of the federal and state agencies charged with enforcing the Clean Water Act. Clearly, Cundiff failed to make any effort to comply with the law.

Finally, a review of Cundiff's tax records demonstrate that he can pay a penalty between the range of $150,000.00 to $225,000.00 payable over five years. (Dwight D. Murray Trial Testimony). The Court also finds that Cundiff has the ability to both fund the proposed restoration plan and pay a monetary penalty.

In light of the evidence presented at trial, and the consideration of the factors set forth in 33 U.S.C. § 1319(d), the Court assesses a civil penalty against George Rudy Cundiff in the amount of $225,000.00; however, the Court will suspend $200,000.00 of the civil penalty provided that Cundiff adequately implements the restoration plan. The sum of $25,000.00 shall be paid in equal installments over five years.

IV. CONCLUSION

In accordance with the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that

Defendants, George Rudy Cundiff and Christopher Seth Cundiff, are permanently enjoined from discharging or causing the discharge of dredged or fill material or any pollutants into any waters of the United States except in compliance with the Clean Water Act. The Defendants shall implement and fund the Wetland Restoration Plan designed by Dr. Thomas Heineke.

IT IS FURTHER ORDERED that Defendant, George Rudy Cundiff, is assessed a civil penalty in the amount of $225,000.00; however, the Court will suspend $200,000 of the civil penalty provided that Cundiff adequately implements the restoration plan. The sum of $25,000.00 shall be paid in equal installments over five years.

/s/
Joseph H. McKinley, Jr. Judge
United States District Court

January 10, 2005

cc: counsel of record

Supreme Court, U.S.
FILED
JUL 8 - 2009
OFFICE OF THE CLERK

No. 08-1376

In the Supreme Court of the United States

GEORGE RUDY CUNDIFF AND CHRISTOPHER SETH CUNDIFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
ELLEN J. DURKEE
JENNIFER SCHELLER NEUMANN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (CWA); 33 U.S.C. 1362(7).

2. Whether a determination by the United States Department of Agriculture that petitioners' predecessor-in-interest had begun converting wetlands to farming use before December 23, 1985, eliminated the need to obtain a CWA permit for petitioners' activities.

3. Whether the district court correctly dismissed petitioners' takings counterclaims for lack of jurisdiction.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 555 F.3d 200. The opinion of the district court on statutory coverage (Pet. App. 34a-48a) is reported at 480 F. Supp. 2d 940. The opinions of the district court finding petitioners liable and dismissing their counterclaims are unreported. The opinion of the district court on the appropriate remedy (Pet. App. 49a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2009. The petition for a writ of certiorari was filed on May 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (CWA or the Act), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). "Pollutant" is defined to include not only traditional contaminants but also solids such as "dredged spoil, * * * rock, sand [and] cellar dirt." 33 U.S.C. 1362(6). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing the CWA. The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other

covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1]

Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act provides limited exemptions from this permit requirement. 33 U.S.C. 1344(f)(1). Even when the discharge of dredged or fill material qualifies for an exemption, a permit is still required under the CWA's recapture provision if the purpose of the discharge is to "bring[] an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). The United States may bring a civil enforcement action in district court against any person who violates the CWA by discharging dredged or fill material into covered wetlands without a permit. 33 U.S.C. 1319(b) and (d). In such an action, the government may seek injunctive relief and civil penalties. *Ibid.*

b. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA, see 33 U.S.C. 1362(7), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to actual or proposed pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection

to such water bodies, *ibid.*[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Id.* at 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

2. Petitioners own two tracts of land in Muhlenberg County, Kentucky, that together contain approximately 188 acres of wetlands. Pet. App. 3a, 5a. Those wetlands are adjacent to Pond and Caney Creeks, which are tributaries of the Green River, a traditional navigable water. *Id.* at 19a. Shortly after petitioner George Rudy Cundiff (Cundiff) purchased the southern tract in 1990, he began clearing the wetlands of trees, excavating drainage ditches, and placing the dredged spoil and other material into the wetlands next to the ditches. *Id.* at 3a-4a. Cundiff did not obtain a permit from the Corps for his activities. *Id.* at 4a. The Corps issued a cease-and-desist letter to Cundiff in October 1991. *Ibid.* De-

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

spite additional directives to stop his activities, Cundiff continued to discharge dredged spoil into the wetlands on the southern tract. *Id.* at 5a.

In 1998, Cundiff's son, petitioner Christopher Seth Cundiff (Seth Cundiff), purchased the tract immediately to the north of his father's property. Pet. App. 5a. With Seth Cundiff's knowledge, Cundiff quickly began excavating that tract and redepositing the spoil into the wetlands. *Ibid.* Federal and state officials repeatedly informed petitioners that they were required to obtain permits for their activities, but petitioners ignored those instructions and continued their activities without a CWA permit. *Id.* at 5a-6a. In total, petitioners dug approximately 11,900 linear feet of ditches on both tracts and redeposited that material into approximately 5.3 acres of wetlands. *Id.* at 25a. Petitioners' activities prevented the wetlands at the site from performing their prior functions, such as providing wildlife habitat and filtering and treating contaminants and toxins, including acid mine drainage, before they entered nearby waterways. *Id.* at 54a.

3. The United States brought suit against petitioners, alleging that they had violated Section 301(a) of the CWA by discharging pollutants into waters of the United States without a permit. Pet. App. 6a. The district court granted the government's motion for summary judgment on liability. *Ibid.* In granting the motion, the district court rejected petitioners' contention that they were not required to obtain a CWA permit because their predecessor-in-interest had obtained a determination from the United States Department of Agriculture (USDA) that he had begun converting wetlands to farming use before December 23, 1985. Mem. Op. and Order, Civ. Action No. 4:01CV-6-M at 9-10 (W.D. Ky. Apr. 24,

2003). The district court explained that "the sole purpose" of that determination was "to prevent the loss of USDA benefits," and that "the clear language of the" application form for the determination stated that "[t]he granting of [the] request . . . *does not remove other legal requirements* that may be required under State or Federal waters laws." *Id.* at 10 (quoting Pets. Resp. Br. Exh. M) (emphasis added by district court).

The district court also dismissed petitioners' counterclaims against the United States, including their claims that the government's actions constituted a taking of petitioners' property without just compensation. Mem. Op. and Order on Mot. to Dismiss Counterclaims, Civ. Action No. 4:01CV-6-M (W.D. Ky. Sep. 12, 2001). The court ruled that it lacked jurisdiction over the takings counterclaims because petitioners sought more than $10,000 in relief. *Id.* at 4-5 & n.4.

After a bench trial, the court enjoined petitioners from discharging pollutants into waters of the United States, and it ordered petitioners to restore the wetlands on their properties. Pet. App. 49a-63a. The court also imposed a civil penalty of $225,000 against Cundiff, but it suspended $200,000 of that amount on the condition that Cundiff adequately implemented the restoration plan. *Id.* at 60a-62a.

Petitioners appealed. While the appeal was pending, this Court issued its decision in *Rapanos*, *supra*. Pet. App. 6a. The court of appeals remanded the case to allow the district court to reconsider, in light of *Rapanos*, whether petitioners' wetlands are covered by the CWA. *Ibid.* On remand, the district court held that the United States may establish CWA jurisdiction over wetlands under either the standard set forth in the *Rapanos* plurality opinion or the standard identified in Justice Ken-

nedy's concurrence. *Id.* at 41a. The district court found that petitioners' wetlands were covered by the CWA under both standards. *Id.* at 42a-48a.

4. Petitioners took a second appeal, and the court of appeals affirmed. Pet. App. 1a-33a. The court held that it was unnecessary to decide whether Justice Kennedy's standard or the *Rapanos* plurality's standard governs CWA coverage because petitioners' wetlands are covered "under both Justice Kennedy's and the plurality's tests." *Id.* at 16a.

The court of appeals also held that petitioners' activities do not qualify for any of the exceptions to the CWA's permit requirements. Pet. App. 26a-27a. The court further noted that, even if petitioners' activities had qualified for one of the statutory exemptions, petitioners "would still have been required to get a permit under the 'recapture provision,' 33 U.S.C. § 1344(f)(2)," because the purpose of their activities was to "'bring[] an area of the navigable waters into a use to which it was not previously subject,' and the 'flow or circulation of navigable waters may be impaired or the reach of such waters reduced.'" *Id.* at 27a (quoting 33 U.S.C. 1344(f)(2)).

The court of appeals also affirmed the dismissal of petitioners' takings counterclaims. Pet. App. 30a. The court explained that the "Tucker Act gives the Court of Federal Claims exclusive subject matter jurisdiction over takings claims seeking more than $10,000." *Ibid.* Because petitioners sought more than $10 million for all of their counterclaims and had not limited their takings counterclaims to an amount within the jurisdictional threshold, the court of appeals held that "their takings counterclaims were properly dismissed." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners contend (Pet. 4-20) that the Court should grant review to resolve a conflict among the circuits as to the proper application of *Rapanos*. Although the courts of appeals disagree as to the proper standard under *Rapanos* for determining whether a wetland is covered by the CWA, this case does not present a suitable opportunity to resolve that conflict. As both courts below correctly determined, petitioners' wetlands are covered by the CWA under any of the competing standards. Pet. App. 16a, 48a. The choice among those standards therefore would not affect the disposition of this case.

The First Circuit has held that the CWA covers all waters that satisfy either the standard announced by the *Rapanos* plurality or the "significant nexus" standard described in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 60-66 (2006), cert. denied, 128 S. Ct. 375 (2007). The Eleventh Circuit, in contrast, has held that CWA coverage may be established only under the standard in Justice Kennedy's *Rapanos* concurrence. See *United States* v. *Robison*, 505 F.3d 1208, 1219-1222 (2007), cert. denied *sub nom. United States* v. *McWane, Inc.*, 129 S. Ct. 630 (2008). No court of appeals has adopted petitioners' view (see Pet. 7-9), that the *Rapanos* plurality opinion sets forth the controlling legal standard.[3]

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[3] Three other courts of appeals, in addition to the Sixth Circuit in this case, have discussed the question without definitively resolving it. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir.), cert. denied,

This Court recently denied the government's petition for a writ of certiorari in *McWane*, which asked the Court to resolve the circuit conflict. The government continues to believe that this Court's clarification of the proper application of *Rapanos* may be warranted in an appropriate case. The present case, however, does not provide a suitable opportunity to decide which of the competing standards controls. The court of appeals concluded that the evidence established CWA coverage under both the *Rapanos* plurality's standard and that of Justice Kennedy, and it expressly declined to choose among the competing standards because that choice would make no difference to the outcome of this case. Pet. App. 16a-17a.

b. Petitioners argue that review should be granted because "the United States failed to prove that [petitioners] had met either the plurality's standard or the standard of Justice Kennedy." Pet. 10. The district court and the court of appeals concluded, however, that *both* standards were satisified. See Pet. App. 16a-17a, 48a. Petitioners' fact-bound disagreement with the concurrent determinations of the two lower courts does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, petitioners' objections to the rulings below lack merit.

Petitioners contend (10-18) that their wetlands do not satisfy the *Rapanos* plurality's requirement of a continuous surface connection with the adjacent creeks be-

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129 S. Ct. 116 (2008); *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 1000-1001 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007).

cause the wetlands are at a higher elevation than the creeks for much of the year. Nothing in the *Rapanos* plurality opinion, however, requires that wetlands and the traditional navigable waters or tributaries to which the wetlands connect be at the same elevation. Rather, as the court of appeals correctly held, the plurality's standard requires "that the adjacent channel contains a 'wate[r] of the United States,'" a standard clearly met here, and that the wetlands have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Pet. App. 19a (quoting *Rapanos*, 547 U.S. at 742).

The district court found the latter requirement satisfied based on evidence that "there [is] no clear demarcation between waters and wetlands" at petitioners' site. Pet. App. 47a. The court of appeals agreed with that determination, noting the district court's finding that a channel in petitioners' wetlands "provides a largely uninterrupted permanent surface water flow between the wetlands and traditional waterways," *id.* at 21a, and "that the water flows through the channel into Pond Creek for all but a few weeks a year," *id.* at 19a. The court of appeals also noted that the district court had found "additional (and substantial) surface connections between the wetlands and permanent water bodies 'during storm events, bank full periods, and/or ordinary high flows,'" which provide "additional evidence" of a continuous surface connection. *Id.* at 21a-22a. The connections found by the courts below establish CWA coverage of the wetlands under the *Rapanos* plurality's standard.

Petitioners also contend (Pet. 18-20) that the government failed to establish a "significant nexus," within the meaning of Justice Kennedy's concurring opinion in *Rapanos*, between their wetlands and traditional naviga-

ble waters. That argument lacks merit. As both the district court and the court of appeals concluded, the wetlands have the requisite "significant nexus" to traditional navigable waters because those wetlands "perform significant ecological functions in relation to the Green River" and its tributaries, Pond and Caney Creeks. Pet. App. 17a; see *id.* at 42a-44a. Those functions include filtering acid mine runoff and sediment from a nearby abandoned mine, storing water that affects the "frequency and extent of flooding" on the Green River, and providing an "important habitat for plants and wildlife." *Id.* at 18a.

Petitioners argue (Pet. 18-20) that the government's evidence was insufficient to establish a significant nexus because the government did not conduct any soil, water, or other laboratory tests. As the court of appeals explained, however, laboratory tests are not necessary to establish CWA coverage under Justice Kennedy's standard. Pet. App. 19a. Although "a district court could find such evidence persuasive, [petitioners] point to nothing—no expert opinion, no research report or article, and nothing in any of the various *Rapanos* opinions—to indicate that [laboratory testing] is the sole method by which a significant nexus may be proved." *Ibid.*

Petitioners also contend that, under Justice Kennedy's standard, wetlands are covered by the CWA only if they "significantly affect the chemical, physical, *and* biological integrity of the other covered waters." Pet. 18 (emphasis added; internal quotation marks omitted). Contrary to that contention, a significant effect on any of those elements would be sufficient to establish a significant nexus. Cf. 33 U.S.C. 1251(a) (objective of Act "is to restore and maintain the chemical, physical, and bio-

logical integrity of the Nation's waters"). In any event, both the district court and the court of appeals found a significant effect on all three elements. See Pet. App. 17a-19a, 43a-44a.[4]

2. Petitioners also argue (Pet. 21-23) that they were not required to obtain a CWA permit because the prior owner of their land had obtained a determination from the United States Department of Agriculture (USDA) that conversion of the wetlands to farming use had begun before December 23, 1985. That argument lacks merit and does not warrant this Court's review.

The Food Security Act of 1985 (FSA), 16 U.S.C. 3821, denies certain benefits to farm program subsidy participants who convert wetlands in order to grow crops. See *United States* v. *Brace*, 41 F.3d 117, 121 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995). The law recognizes,

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[4] Petitioners assert (Pet. 13-14, 19-20) that the decision below conflicts with *Simsbury-Avon Preservation Society* v. *Metacon Gun Club, Inc*., 472 F. Supp. 2d 219 (D. Conn. 2007) (*Simsbury*), appeal pending, No. 07-0795CV (2d Cir.). A conflict between the decision below and a district court decision would not warrant this Court's review. See S. Ct. R. 10. In any event, there is no conflict. Contrary to petitioner's contention (Pet. 13-14), the district court in *Simsbury* did not adopt petitioners' proposed rule that wetlands and adjacent waters must be at the same elevation to have a continuous surface connection. The court found insufficient evidence of a continuous surface connection because the flow between the wetlands and the adjacent water was "intermittent." *Simsbury*, 472 F. Supp. 2d at 228-229 (citation omitted). Here, in contrast, the courts below found "a largely uninterrupted permanent surface water flow." Pet. App. 21a. Contrary to petitioners' contention (Pet. 19-20), the district court in *Simsbury* did not hold that a party seeking to establish a "significant nexus" between wetlands and adjacent waters must introduce laboratory tests. Although the court relied on laboratory "data from testing on lead concentrations," 472 F. Supp. 2d at 229, it nowhere suggested that laboratory tests are the *only* permissible evidence of a "significant nexus."

however, that wetlands converted prior to passage of the FSA (December 23, 1985) remain eligible for farm program benefits. 16 U.S.C. 3822(b)(1)(A). Petitioners' predecessor-in-interest obtained a USDA determination that conversion on his property had started before that date. See C.A. App. 1062; Pet. 22.

As the district court correctly held, that determination did not obviate the need for petitioners to obtain a CWA permit before discharging dredged or fill material into their wetlands. See Mem. Op. and Order, Civ. Action No. 4:01CV-6-M at 9-10 (W.D. Ky. Apr. 24, 2003). The CWA lists the specific circumstances in which dredged or fill material may be discharged into covered waters without a permit, 33 U.S.C. 1344(f)(1), and the Act does not exempt discharges merely because a landowner has a USDA determination that he began conversion of wetlands to farming use before December 23, 1985. The statutory and regulatory provisions under which such USDA determinations are issued make clear that the determinations simply exempt the recipients from ineligibility "for certain benefits provided by the [USDA] and agencies and instrumentalities of USDA." 7 C.F.R. 12.1(a); see 16 U.S.C. 3821-3822; 7 C.F.R. Pt. 12. The application form filled out by petitioners' predecessor-in-interest stated that the "granting of a [determination] request does not remove other legal requirements that may be required under State or Federal water laws." C.A. App. 1063; see *Brace*, 41 F.3d at 127.

In any event, petitioners do not contend that the court of appeals' resolution of this issue conflicts with any decision of this Court or another court of appeals. Nor do they assert that the issue is one of general importance. Petitioners also do not dispute the court of

appeals' holding (Pet. App. 27a) that, even if petitioners otherwise qualified for a CWA exemption, they would still have needed a permit because of the CWA's recapture provision, which requires a permit for discharges of dredged or fill material for the purpose of "bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). Accordingly, this issue does not warrant the Court's review.

3. Petitioners also argue (Pet. 24-33) that the government's actions with respect to their wetlands effected a taking of their property without just compensation, in violation of the Fifth Amendment to the United States Constitution. Petitioners' takings claim is not properly before this Court. Neither the district court nor the court of appeals addressed the merits of that claim. Instead, the district court dismissed the claim for lack of jurisdiction, Mem. Op. and Order on Mot. to Dismiss Counterclaims, Civ. Action No. 4:01CV-6-M at 4-5 (W.D. Ky. Sep. 12, 2001), and the court of appeals affirmed that dismissal, Pet. App. 30a.

The court of appeals' resolution of the jurisdictional question is correct. The Tucker Act vests the United States Court of Federal Claims with jurisdiction over takings claims against the United States without regard to the amount in controversy. 28 U.S.C. 1491(a)(1); see *Jan's Helicopter Serv., Inc.* v. *FAA*, 525 F.3d 1299, 1304 (Fed. Cir. 2008). Federal district courts have concurrent jurisdiction over any such claims "not exceeding $10,000 in amount." 28 U.S.C. 1346(a)(2). Because petitioners sought more than $10,000 on their takings claim, the district court lacked jurisdiction over that claim. Pet. App. 30a.

Petitioners do not discuss, much less dispute, the jurisdictional rulings of the courts below. Accordingly, petitioners' takings claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
ELLEN J. DURKEE
JENNIFER SCHELLER NEUMANN
Attorneys

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